

U.S. COMMISSION ON CIVIL RIGHTS

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COMMISSION MEETING

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FRIDAY,
MARCH 18, 2005

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The Commission convened at 9:30 a.m. in
Room 540 of 624 Ninth Street, N.W., Washington, D.C.,

GERALD A. REYNOLDS, CHAIRMAN, presiding.

PRESENT:

GERALD A. REYNOLDS, CHAIRMAN
ABIGAIL THERNSTROM, VICE CHAIRMAN
JENNIFER C. BRACERAS, COMMISSIONER
PETER KIRSANOW, COMMISSIONER
ELSIE M. MEEKS, COMMISSIONER
ASHLEY L. TAYLOR, COMMISSIONER
MICHAEL YAKI, COMMISSIONER

KENNETH L. MARCUS, STAFF DIRECTOR

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STAFF PRESENT:

TERESA BROOKS
CHRISTOPHER BYRNES
DEBRA CARR, Esq., General Counsel
IVY L. DAVIS, Chief, Regional Programs
Coordination Unit
BARBARA DELAVIEZ
TERRI DICKERSON, Assistant Staff
Director
PAMELA DUNSTON, Chief, Administrative
Services and Clearinghouse Division
BARBARA FONTANA
LATRICE FOSHEE
DORELLE GRAY
GEORGE M. HARBISON, Chief, Budget and
Finance Division
SETH JAFFE
SOCK-FOON MacDOUGAL
TinaLOUISE MARTIN, Director, Human
Resources Division
EMMA MONROIG, Solicitor/Parliamentarian
ANA MARIA ORTIZ
JENNY PARK
BERNARD QUARTERMAN
ANGELA ST. HILAIRE
DEBBIE VAGINS
VANESSA WILLIAMSON
AUDREY WRIGHT
TIFFANY WRIGHT
MIREILLE ZIESENISS

COMMISSIONER ASSISTANTS PRESENT:

JACK DALY
PATRICK DUFFY
CHRISTOPHER JENNINGS
LISA NEUDER
KIMBERLY SCHULD
MELISSA SHARP

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P-R-O-C-E-E-D-I-N-G-S

(9:28 a.m.)

CHAIRMAN REYNOLDS: The meeting should come to order now. We have a quorum.

I. APPROVAL OF AGENDA

CHAIRMAN REYNOLDS: The first item on the agenda is the approval of the agenda. May I have a motion to approve the agenda?

VICE CHAIRMAN THERNSTROM: So moved.

CHAIRMAN REYNOLDS: May I have a second?

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Okay. All in favor?
(Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

CHAIRMAN REYNOLDS: Okay. No responses, no opposition. The motion passes.

II. APPROVAL OF MINUTES OF

FEBRUARY 18, 2005 MEETING

CHAIRMAN REYNOLDS: Next, approval of the minutes of the February 18th meeting. May I have a motion?

COMMISSIONER BRACERAS: So moved.

VICE CHAIRMAN THERNSTROM: Second.

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CHAIRMAN REYNOLDS: Any discussion?

(No response.)

CHAIRMAN REYNOLDS: Okay. All in favor please say "aye."

(Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

CHAIRMAN REYNOLDS: Okay. The motion passes.

VICE CHAIRMAN THERNSTROM: I have lost my assistant and, therefore, all of my materials. I am going to look over your shoulder until she shows up.

CHAIRMAN REYNOLDS: That's fine.

VICE CHAIRMAN THERNSTROM: There she is. Thank you. Okay. Thank you very much.

III. ANNOUNCEMENTS

CHAIRMAN REYNOLDS: At this point we're going to go through a few announcements. The first item on the agenda, as everyone knows, Commissioner Redenbaugh has elected to resign. The resignation is effective April 1st. Russell has served on the Commission for approximately 15 years. Russell has been an asset to the Commission. And his insights will be missed.

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I was under the impression that Russell would be attending this hearing. Does anyone have better information than me?

COMMISSIONER KIRSANOW: Mr. Chair, I spoke to Russell. And he indicated he was not going to be attending today.

CHAIRMAN REYNOLDS: Okay. And I would also like to announce the retirement of a former Commission employee: Art Palacios. On behalf of the Commission, I'd like to state that he is one of our longest-serving Commission employees. He retired on March 1st from the Western Regional Office, where he worked as a civil rights analyst.

He had over 31 years of civilian governmental service. Of those 31 years, Art spent 26 of those years with the Commission. Art started at the Commission as an equal opportunity specialist for 8 years and spent the last 18 years as a civil rights analyst.

On behalf of the Commission, I would like to thank Art for his long and dedicated service to the Commission and wish him all the best in his retirement.

The second item on the agenda, I am

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pleased to announce that March is Women's History Month. During Women's History Month, we celebrate the achievements of our nation's women.

For generations, American women have helped to build our great nation through their leadership as writers, mathematicians, attorneys, teachers, artists, doctors, scientists, and in other professions. As mothers, daughters, and sisters, women have supported, led, and strengthened American families and communities. We celebrate those who have broken down barriers for women.

We commemorate Women's History Month. The U.S. Commission on Civil Rights encourages all Americans to celebrate the extraordinary contributions and accomplishments of American women.

Finally, I would like to announce that on March 6th of 2005 we celebrated the 40th anniversary of the march over the Edmund Pettis Bridge in Selma, Alabama. That march contributed to the passage of the Voting Rights Act of 1965.

The brave actions of those who chose to march at great personal risk calls out to us today and requires us to honor and commemorate their courage.

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Now, are there any other announcements by other commissioners? Yes?

COMMISSIONER KIRSANOW: I would just like to make a point with respect to Commissioner Redenbaugh. He served on the Commission for such a long time.

I got a chance to know Commissioner Redenbaugh the three years that I served on the Commission. I viewed him as extremely bright, the most temperate of the commissioners, clearly much more temperate than myself.

In the Post article a couple of days ago with respect to his resignation, I was quoted as saying that I thought his IQ was twice mine. I think I lied. It's clearly three to four times mine.

And I agreed with much of what he had to say in terms of his assessment of the Commission, structural problems related to the Commission, that significant reforms needed to be made. In fact, 99 percent of what he had to say I think I agreed with.

He was a consistent voice on reform. He had noted the fact that this Commission was in extraordinary disarray, that we had informational vacuums that prevented us from implementing certain

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reforms, that we were possibly -- because we don't have fundamental controls in place to elicit the information necessary to determine the whole REN, we don't even what kind of whole REN.

He was a consistent voice in terms of reform and had recommended certain reforms. However, where I disagree with Commissioner Redenbaugh is with his conclusion that somehow because of structural problems within the Commission or maybe other reasons, that this Commission was not going to be moving expeditiously on reform.

This is something, a hole, that we have inherited that was engendered over a period of a number of years. It's a significant hole. It's something that is going to require prodigious efforts on all of us.

And I have not seen anything to this point that would indicate that we're not going to be moving forward. In fact, I know that the staff director has moved quite quickly to implement at least 20 of the 29 GAO recommendations.

My departure from Commissioner Redenbaugh I think is that we will be moving expeditiously. I know we are going to be considering reforms today.

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In fact, I think the reforms that Commissioner Redenbaugh and I authored a while back are reforms that everyone agrees with.

As opposed to what he has to say in terms of his doubt that it may be implemented, I would be surprised, in fact, if we didn't have unanimity on implementing reforms basic to the structural integrity of this Commission.

So I am saddened that Commissioner Redenbaugh has resigned. He was a valuable member of this Commission. We I think will be using some of his ideas in the future. And I think that it's a new day at the Commission. We're going to be making some significant progress.

CHAIRMAN REYNOLDS: Okay. I would just like to add to that. There is no higher priority at the Commission than getting our house in order. The programmatic work that we do here is extremely important, but if we don't have operational and financial controls in place, then this organization cannot be effective.

The hole that we inherited, as Commissioner Kirsanow phrased it, yes, we inherited some significant challenges. But all of us around

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this table have accepted the challenge. We intend to remedy the structural problems that exist at the Commission today.

So to the extent that anyone is entertaining the notion that we are not committed to reforming this agency, I am here to tell you that you are wrong.

Ken, you --

STAFF DIRECTOR MARCUS: Mr. Chairman, I am delighted to announce that we were joined since the last meeting by a new employee, my new attorney adviser and special assistant, Mr. Christopher Byrnes, who will stand, please. He had previously been attorney adviser in the Office for Civil Rights at the Department of Education. And we're delighted to have him in the Office of the Staff Director. Thank you, Mr. Byrnes.

And also, to add that Mr. Seth Jaffe, who joined us last fall but might not have been introduced at that time, is a relatively new member of the Office of General Counsel, who has recently joined us temporarily as a special assistant in the Office of the Staff Director. And we're delighted to have him as well.

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CHAIRMAN REYNOLDS: All right. At this point -- well, I guess, Ken, you could continue. We're up to the staff director's report.

STAFF DIRECTOR MARCUS: Thank you.

IV. STAFF DIRECTOR'S REPORT

STAFF DIRECTOR MARCUS: Mr. Chairman, Madam Vice Chairman, commissioners, if it please the Commission, I would like at this time to supplement my written report with additional remarks regarding the financial condition of the agency, GAO implementation, congressional compliance, and any matters of concern to the commissioners.

During our last meeting, I was asked to address the state of the budget during this meeting.

And I believed as recently as earlier this week that I would be able to explain to the commissioners the extent of the budget problem that we have.

During the last meeting, I indicated that this would be a particularly austere year for the Commission. Now, those who are familiar with the Commission know that we have had very tight years before, but this is earlier than in most years to have gotten the message of that kind from the staff director. It has been my intent to be as transparent

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as possible as we identify the problems that we have inherited and as we try to turn them around.

Unfortunately, I am not able to speak with the specificity that I had hoped to about the extent of the problem. So what I propose to do is to tell you what we do know; what we don't know; why we don't know what we don't know; and, to the extent we are able to, how we got here; and to answer questions on that, for which if there are some details, I may need to be joined by career staff as well.

I had hoped as recently as earlier this week to be able to give you a specific number. And I believe that that number was going to be approximately \$150,000.

Based on our best estimates earlier this week, it appeared that we were on track to overspend our appropriations by approximately \$150,000 if serious changes were not made.

Now, that may sound like a small number relative to other government agency budgets, but it is a large number relative to the \$9 million budget of this agency. Moreover, it is a large number relative to the rather minimal amount of discretionary spending available to this agency. It

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is a large number relative to the nonsalaried, non-benefit, non-rental money available to us. And that is why we have been looking at what might be some very painful decisions that would have to be made in rather short order.

At this point, unfortunately, I cannot tell you that we have that figure for certain, that, instead, what we have is a range of numbers which will require I think considerable explanation.

Over the course of the day yesterday, I looked at a variety of numbers that were prepared by staff, all of which for the most part showed a rather substantial budget deficit based on the assumption that we continue to spend as we spend now.

All of them showed that we would be in the deficit by at least \$45,000. Some of them, however, showed that it could be as high as \$200,000 or more.

Now, that is an extraordinarily large range. And we are, of course, really late in the fiscal year not to know the answer for sure. So I am going to take a little bit of time, if it please the commissioners, to talk a little bit about the background to the situation we're in and why it is

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that in March of the fiscal year that began last October 1, we know that we are in significant difficulty but we are not sure exactly what that difficulty is.

During an earlier meeting, I discussed the relationship that we had had with the Bureau of the Public Debt, which provided full accounting services for us. And so you may recall that they were our accounting service until fiscal 2004.

The commissioners were given a variety of explanations for why the relationship between the Bureau of the Public Debt and this agency was terminated. At the time, it was explained that the Bureau of the Public Debt would have been more expensive than what this agency was prepared to pay. And, in fact, it appears from the record that I have seen that the Bureau of the Public Debt did want this agency to put into place some controls or protections that would have been expensive.

But I have also shared with the agency correspondence that I have received from the Department of Treasury indicating that the Bureau of the Public Debt made the decision to terminate our contract based on their determination that we were at

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such significant risk of violating the Anti-Deficiency Act that they did not feel that they would be able to continue to service our account. That explanation has been confirmed to me in conversations with employees of the Bureau of the Public Debt.

As a result of that decision by BPD, my predecessor was forced during the midst of fiscal 2004 fiscal year to obtain a new accounting service provider. It is I understand always difficult to switch service providers in the middle of the fiscal year.

Moreover, the amount of money that we had budgeted for accounting services was evidently small relative to the needs of accounting service providers. It appears that there were not very many choices to be had.

We retained Booth Management Company at that time in the middle of the fiscal year. And it is a service provider which, by their admission, did not have much experience with respect to providing full accounting services to federal agencies.

At the same time, our budget and financial services staff has dwindled to the point

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that we had only one full-time employee in that staff, Mr. George Harbison, who has subsequently transferred to be our Director of Personnel and who is acting as Director of Budget and Finance.

We now have difficulties in terms of even analyzing the extent of the numbers. In terms of the most recent data set that we were reviewing over the course of the day yesterday, there were different sorts of assumptions that made it difficult to know exactly what the deficit is.

For example, the largest single variation in the numbers that I have seen is attributable to a variance in the amount of benefits that we are or should be paying to Commission employees.

The initial numbers that I had received from the Budget and Finance Office were based on an assumption that benefits that we are paying to employees are 23.8 percent of salary.

Mr. Harbison has subsequently determined that the numbers that these are using are lower than that. They are 20.8 percent. This has been a source of confusion among our budget and finance staff, who cannot so far determine the discrepancy between those two numbers.

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The most recent set of numbers I have seen has used the 21 percent figure, as what I explained is a compromise between those two figures as well as a rounding off.

The difference between the 20.8 percent figure and the 23.8 percent figure, that 3 percent is an enormous amount of money relative to our budget and could explain an entire budget shortfall. I have not yet been able to get an explanation from Budget and Finance as to why it is that this variation exists.

The Booth numbers are purported to be actual figures. As a general rule, I like using actual figures. On the other hand, we have not been able to understand why those actual figures appear so low relative to what we know of actual figures in prior years given what we understand about the increases in health insurance and other benefits.

The 20.8 percent appears low to our internal budget staff. We have a host of questions arising from that. Are those really the actual numbers? If they are the actual numbers, are we paying the right amount of benefits or are we underpaying benefits? If they are the right numbers,

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does that mean the numbers we have from prior years are wrong? Why is it that we cannot have an agreement between our internal and external providers of accounting services?

When I first arrived in December, I was initially told that we did not know whether we were on track for the budget because budget matters had been centralized within the Office of the Staff Director and our career staff were not privy to all of the information they would need to know in order to determine whether we were overspending our appropriations.

For example, when I arrived in December -- and keep in mind that the fiscal year began October 1 -- it was still not clear to any of the staff that I could speak to whether we had renewed contracts with major vendors, including, for example, McKinney and Company.

It took quite some time in order to get clarity as to the extent to which we have incurred financial obligations during the prior management which would bind us today.

There was a large number of questions about our obligations, which simply were not known at

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that time. For instance, I am now told that there were some \$75,000 in rental payments from last year that were deferred until this year. Now, that is a portion of last year's rent, but it is a significant amount of money which was deferred by my predecessor from last fiscal year until this fiscal year.

It was only in the January-February period that I started seeing data that indicated that we might be at risk of a shortfall. And that's why I indicated immediately in the last meeting that this was an extremely austere year.

What we are now in the midst of doing is having all of our resources intensely focused on coming up with the answers to the sorts of questions that I just described. We know that we have a significant financial problem, but we also have accounting weaknesses that have made it impossible so far to know the extent of the problem.

Even the more optimistic scenarios suggest that we need to make very strong changes very rapidly. I have been asked by staff and others whether that means that we would have to consider such matters as office closures, reductions in force, and/or furloughs. Now, the answer, of course, is

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going to depend on the exact extent of our shortfall.

Under most of the analyses that I have seen, under all but the most optimistic, we will need to make very serious decisions of that sort. And they will need to be made in very short order.

Given the realities of the fiscal year ending in September and the appropriate notice periods that are, of course, required in law by collective bargaining agreements and are simply right, we would need to make decisions rather rapidly in order for certain of our options to remain on the table.

So we will be looking very intensely over the coming days at what sorts of changes can be made so that we know the exact data. But it is clear that there will need to be very tough decisions on those sorts of matters.

Now, I have been asked about discretionary types of expenditures that I have added to the budget. And I will say that I have subtracted one and added two.

I have not requested any services from McKinney and Associates in the public relations area since my arrival. And we have been doing that work

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in-house and budgeting that all PR would be done in-house, which is a significant savings.

On the other hand, we have budgeted additional monies for a full-service audit as well as additional audit services. Those are the discretionary expenditures. And it is a total of approximately 62,000 that were budgeted for those 2 amounts. That figure is not terribly different from what we were planning to spend on McKinney.

Other than that, given the shortfalls that we have had in recent years, there is not a lot of wiggle room left for us. Moreover, we have to be prepared for future years. This is not an agency that has done a lot of future planning financially. But we understand that if we receive the President's budget this year; in other words, if we received the same \$9 million that we have received over the last several years, the extent of the shortfall we're looking at this year, will be considerable expanded next year. So we have to look at cost-saving situations this year that will not send us in a similar sort of problem a year from now.

What that means is that even if the extent of the shortfall is on the more conservative

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line of the spectrum, we still have to look at the additional pressures, which the 2006 fiscal year budget will place on us this year and make sure that we are creating solutions that deal with both.

I have a few other topics on the staff director's report. And I don't know if it is the preference of the chairman and the commissioners that I continue through to the others or to see if there are questions with respect to financial conditions.

CHAIRMAN REYNOLDS: Well, I think at this point, we should entertain some questions. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Staff Director, you had indicated that we had to make some decisions with some alacrity.

VICE CHAIRMAN THERNSTROM: I'm sorry. I can't hear you.

COMMISSIONER KIRSANOW: The staff director had indicated that we had to make some decisions with some alacrity. And, second, because we don't have I think institutional controls to divine the kind of information necessary to get us budgetary information, we're not even sure to what extent certain monies may have been deferred from the

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present fiscal year to future fiscal years.

So my question is, can you give us a more definitive time frame or what the window is within which we must act to forestall what you currently believe may be the range of deficit given the fact that we are halfway through the fiscal year?

And, second, is, do you believe that there may be other items or issues that have been deferred from prior years to the present fiscal year that we haven't yet gotten our hands on?

STAFF DIRECTOR MARCUS: Let me try both of those questions, Commissioner Kirsanow, in reverse order. With respect to the question of costs that were deferred to this year, the rent is the one major item that I would describe as a deferral, although I may need to defer myself to career staff if there are any additional ones.

I will say that there are significant expenditures that we have to pay for this year based on things that were done in the past. For example, we are paying this year for EEO claims that had been resolved in prior years. That is a significant drain on the budget of some \$188,000 this year.

I have not seen this as a specific

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deferral but, rather, as a matter of we're finally going to have to pay the bill on what was done in the past during the prior management.

Similarly, there may be other sorts of decisions that were made in the past; for instance, new hires and other obligations that we're paying for now, but rent is the largest.

COMMISSIONER KIRSANOW: But would it be fair to say that we still don't have our hands around the scope of expenditures that may have to fall on our watch that have incurred on a prior watch?

STAFF DIRECTOR MARCUS: What I would say is that I was given new information about expenditures that staff wasn't available into January and February.

It's always hard to know what you don't know. I am not expecting to get more surprises of that sort, but I have gotten certainly a number of surprises over time with expenditures that I haven't known about until fairly late in the fiscal year.

So what I would say is we are not expecting to hear any more. And, as far as we know, we have seen all of it, but we have been surprised before.

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COMMISSIONER KIRSANOW: And the second question with respect to what is our window of opportunity for making decisions on budgetary items?

STAFF DIRECTOR MARCUS: That's a good question, Commissioner Kirsanow. I believe that it is very short because with the fiscal year ending in September and given the notice periods, the three-four-month notice periods with respect to different sorts of decisions that have to be made, there are certain options that either disappear or become more limited after even April 1.

So what I would say is we have to really focus over the next several days and the next few weeks on figuring out whether we need to make any decisions that have to be made in advance of April 1.

After that, there remain things that can be done in the future that don't require so much notice, but we really have a window over the next couple of weeks that has options that we won't have after this.

CHAIRMAN REYNOLDS: Commissioner Meeks?

COMMISSIONER MEEKS: Well, as I listen to this, you know, I completely agree that whatever financial controls weren't in place or whatever can

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be improved should be, but the whole conversation really is about we have had a flat line budget for 15 years.

And our mandate hasn't changed. There are many good projects that went forward, but with inflation and the fact that our mandate hasn't changed, this Commission is starved. Its budget is starved.

I don't see that that is going to change in the near future. So, I mean, I think this brings up a real question about how do we do meaningful work.

I mean, get the controls in place, absolutely. But then I think it is a very serious question about what kind of projects or how many projects even or how we can fulfill our mandate. And I think that is the big question.

And it hasn't been just this administration, by any means. It's been many administrations that have starved the Commission.

CHAIRMAN REYNOLDS: I'd like to respond, Ken. Commissioner Meeks, you raise a very important question. I am in full agreement with you. Ultimately the budget for this agency needs to be

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■ tied to inflation.

■ But the only way we are going to get
■ there, I believe that we are going to have to get our
■ financial house in order. We are going to have to
■ demonstrate to members of Congress and the
■ administration that we can be good stewards.

■ So the first order of business in my view
■ is to implement all of the reforms that are necessary
■ to enable us to track our expenditures.

■ COMMISSIONER MEEKS: No, no. I mean, I
■ absolutely agree with that, absolutely. There is no
■ doubt about that. I am just saying that that can be
■ fixed. Financial controls can be put in place. And
■ it sounds like they are. But in the end, with
■ inflation and with our mandate, we still have very
■ serious issues of how we really fulfill our mandate.

■ CHAIRMAN REYNOLDS: I agree with you. I
■ guess I'm making a small point. And that point is
■ that our ability to go and make the case for an
■ increase in our budget, it depends on what we do in
■ terms of reform.

■ The faster we implement meaningful
■ reform, the sooner we will be in a position to go to
■ Congress and to go to the administration --

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COMMISSIONER MEEKS: Absolutely.

CHAIRMAN REYNOLDS: -- to seek increases in our appropriation.

COMMISSIONER MEEKS: Absolutely. I couldn't agree more.

CHAIRMAN REYNOLDS: Yes, Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I have a question for the staff director. Based on what I am hearing, is there any prospect at this point -- again, we don't know what we don't know, but do you think there is any prospect that this Commission can embark upon any projects beyond a statutory report?

STAFF DIRECTOR MARCUS: Yes, Commissioner Kirsanow.

Now, I would say in response both to that question and also Commissioner Meeks that we have reached a point with respect to the difficulty in dealing with the structural and financial issues that I have had to divert some resources from Adarand projects into financial matters. And I'm probably going to have to do a little bit more of that.

There are some people, including, for instance, in the Office of General Counsel, who might

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otherwise be working on legal reports who are focused, instead, on either legal analysis or supporting the financial side. So it is certainly the case that the financial and structural challenges that we have, even this year, are having an impact on our capacity to complete projects.

Nevertheless, under these very difficult circumstances, our staff is moving forward on a number of projects. The highest priority by law has to be the statutorily mandated enforcement project. And the Office for Civil Rights Evaluation is working on an Adarand project, which has, of course, been talked about within the Commission since at least 2030.

Additionally, however, work is going on for other projects. The Office for Civil Rights Evaluation continues to do work to look at minority employment issues, for instance. Moreover, the Office for Civil Rights Evaluation continues to analyze federal funding for civil rights agencies.

Additionally, analysis has been ongoing regarding Voter Act reauthorization issues. So we have not stopped work on important projects. And what I would say, in addition, is this. Our staff

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had been under extremely difficult circumstances as they have been hearing about the budget, as they have been under tight financial straits, and as this week we received yet another threat to the employees combined with a threat to the President in the form of a purported anthrax attack, which is the third one that we have received recently.

So we are dealing with some very difficult circumstances for staff, but people are committed to doing their work and, even under difficult circumstances, are engaged in those projects.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRMAN THERNSTROM: Well, first I want to say that I know how difficult a period this is for the staff as they listen to these numbers, as they contemplate possible actions that must be taken.

And I know that the staff director is committed to trying to protect the staff, and I think every commissioner here is concerned about morale at the Commission and appreciative of the fact that the staff under difficult circumstances is moving forward on the projects that are already on the pipeline.

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With respect to projects not already in the pipeline, will we be able to attach a cost to each project or at least have an estimate of the cost before we vote on those projects, on those proposed projects?

STAFF DIRECTOR MARCUS: Vice Chairman Thernstrom, if the Commission would like an estimate, we can provide an estimate. I have to say we don't have one available today.

VICE CHAIRMAN THERNSTROM: No. I understand that. Yes.

STAFF DIRECTOR MARCUS: We can generate one in the future. Now, most of the costs of projects are staff salary and benefits, and very little is out of pocket. So it's largely a matter of estimating based on the number of staff per project. But we can provide that if requested.

Now, of course, some of the work on that would have to be done by the same person or people who are urgently trying to figure out the extent of the financial hole we're in and solve it. So it's also a matter of making sure that we extinguish the fire that we've got first.

CHAIRMAN REYNOLDS: Ken, when you put

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■ together these estimates, what I would like to see is
■ something that -- I want you to red flag the projects
■ that are going to cause you to take away resources
■ from projects related to reform. To the extent that
■ we can avoid redirecting resources away from reform
■ efforts, that's the way we should go in my view.

■ Yes?

■ COMMISSIONER BRACERAS: Excuse me. Well,
■ I have two questions. The first, piggybacking on
■ this current discussion, it seems to me that the
■ relevant consideration is how much will a project
■ cost above and beyond the staff, the cost of the
■ staff and the benefits because those people are
■ already here. And presumably, you know, if they're
■ not working on one project, they're working on
■ another, they're working on reform efforts.

■ So what would be helpful to me in
■ deciding whether to go forward with certain projects
■ or whether we anticipate any costs beyond that in
■ terms of hearings or public service announcements
■ that might go along with the project or consultants
■ that might need to be retained. And if that could be
■ at least broken out and itemized, that's the relevant
■ figure to me.

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VICE CHAIRMAN THERNSTROM: Yes, absolutely. And I should have stated it as such.

COMMISSIONER BRACERAS: Because in terms of the allocation of resources that are already in place and whether or not particular staff are working on A or B substantive project or whether they're working on reform, that's a matter that I believe is within the staff director's discretion, how to allocate staff time.

But what we need to know is whether a project we might be voting on might cost more than what we are already paying, how many hours somebody is going to --

CHAIRMAN REYNOLDS: Yes. Basically out-of-pocket expenses.

COMMISSIONER BRACERAS: Right, out-of-pocket expenses, but knowing how many hours a particular staff person is going to devote to --

CHAIRMAN REYNOLDS: Right.

COMMISSIONER BRACERAS: -- A as opposed to B is irrelevant to me in terms of -- it's not an additional cost. That's a priority issue that's for the staff director.

VICE CHAIRMAN THERNSTROM: And I should

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have made that clear that that is the question.

STAFF DIRECTOR MARCUS: We would be very pleased to do it that way with the one caveat that I would add that it would be my order of priorities to the extent that financial analysis is required to have the financial people first focusing on making sure we know the parameters of the problem and dealing with that; and then, second, looking at the out-of-pocket expenses of potential projects.

COMMISSIONER BRACERAS: I agree. I agree with that.

My second question has to do with how we got here. And that is you mentioned that the career staff had been kept in the dark about a number of matters or that they didn't have the information because budgetary issues were consolidated in the Office of the Staff Director.

Presumably, if accurate records have been kept by the prior staff director, when you came in, you would then have access to that information. But what I am inferring from what you said is that budgetary information is consolidated in the Office of the Staff Director under the prior regime and that no records were left behind for you to access or

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limited records were left for you to access.

STAFF DIRECTOR MARCUS: That's correct, Commissioner Braceras. And I can tell you what I have found. And if you want more specifics about what happened before my arrival, I will have to defer to career staff.

What I will say is this. Most of the questions that I have had about the finances of the agency were not answerable to the career staff because they indicated that finance and budgetary matters were centralized within the office of my predecessor, the prior staff director.

Moreover, we have not been able to locate the records of the prior staff director, nor has he been willing to speak with us about what happened with the budgeting and finances.

COMMISSIONER BRACERAS: Right. So that indicates to me that either: A) records weren't kept or B) they were kept and something was done with them. They were either removed or destroyed.

STAFF DIRECTOR MARCUS: I can't think of any other explanation, Commissioner Braceras.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

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COMMISSIONER KIRSANOW: First of all, I concur with Commissioner Braceras in terms of the cost breakdown. It seems to me only those costs above the operational baseline are relevant to us.

And it goes to a subsidiary question I have. And that is I asked earlier about projects, whether or not we could implement projects, in terms of the current projects.

I'm presuming the projects we're currently working on do not incur costs above our operational baseline. In other words, there are no extraordinary costs beyond wages, salaries, benefits, rent, et cetera, et cetera. Is that correct?

STAFF DIRECTOR MARCUS: I have allowed limited expenses connected with these projects. The expenditures have not been extraordinary. There have been some out-of-pocket expenses.

For example, staff used the telephone, including long distance calls. Moreover, they used the mains and occasionally have had to use other means of transmitting documents.

So there have been low-level expenditures with respect to those projects, but there have not been significant expenditures relating, for instance,

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to significant travel or other out-of-pockets of that sort.

Now, there is one large expenditure relating to the projects I mentioned earlier that was made, but it was authorized prior to my arrival. I referred to a project regarding Voter Reauthorization Act.

My predecessor apparently authorized a contractor to do a considerable amount of the legal and policy analysis. So that was outsourced. And that has had to be paid by the Commission.

CHAIRMAN REYNOLDS: Ken, do you know, what's that figure?

STAFF DIRECTOR MARCUS: I don't. I am told that that figure is \$20,000.

CHAIRMAN REYNOLDS: Okay. Thank you.

COMMISSIONER BRACERAS: And that was something that was incurred on the watch of the prior administration, but the bill came to you under your administration?

STAFF DIRECTOR MARCUS: It was authorized by prior management. And I will have to check to find whether that was paid during this fiscal year or last.

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The general counsel is informing me that it was paid in three stages. And I could defer to her for further explanation if you would like.

CHAIRMAN REYNOLDS: Ms. Carr, would you please provide us with whatever information you have?

VICE CHAIRMAN THERNSTROM: Yes. And has it been paid in full at this point?

MS. CARR: The contractor was billing in three stages. The first two stages, I believe, were billed under the prior staff director. The third stage was billed post-transition. And I do believe that final bill has been paid.

CHAIRMAN REYNOLDS: Thank you. Commissioner Yaki, you have been patient.

COMMISSIONER YAKI: I'm the new guy. I figure I always get picked last.

I wanted to go back to the central question, which dealt with the short window of time that we have to sort of figure out what the real numbers are and what actions we have to take. I think it is very important for the integrity of the Commission and for the staff who work here that we make that as transparent as we possibly can.

I think whatever number we come up with

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has to be scrubbed, double checked, and triple verified so that there can be no question about where it came from, how it came to be, and what that final number is because that number, whatever it is, is going to going to be the determinant of very tough decisions made very quickly, either by the Commission or by the staff director.

So I think it is very important that that number, whatever, have immense amount of integrity attached to it so no one can question that it was this or that because ultimately when we talk about -- and we have been dancing around it during this entire discussion -- how the majority of our budget is salaries and benefits, I think everyone can kind of read between the lines -- and I am even still dancing around it -- about what the implications of that could be.

And I think we owe it to the people who have been working under terribly adverse conditions over the past years here doing yeoman's work in terms of producing reports, responding to commissioners, responding to document requests from whatever that number, have a very, very solid backing.

I also think it is important that we

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communicate very clearly in the actions that we do that reform is different from emergency measures. Somehow they are connected.

But any emergency measures we may take are not a consequence of the agency continuing to spiral out of control. It is simply a short-term immediate remedy as a consequence of other things beyond our control, which reforms on a longer-term basis going forward are going to be addressing because, you know, I can just see the headlines coming out of the papers depending on what happens.

So I think it is very important that we make that distinction because, again, people can confuse things that any agency would have to do in a similar situation. No matter how good, no matter how well it is being run at the time, something may happen that causes you to have to do something drastic. But I don't think it necessarily means that the agency is spiraling out of control.

Finally, going forward when we talk about the fact that -- and, by the way, I was privileged to be at the hearing yesterday. And I heard very clearly -- I believe it was even from the chair -- that he was hoping that when we have our financial

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and management house in order, he would be very supportive of getting the block off of the appropriations and getting it retied and getting it starting to go up. So I think that that was very encouraging.

But certainly if we can't solve this in six months and we're faced with fiscal year '06 with a level budget, then I think that we should start thinking very hard about the fact that nothing should really be sacred in how we look at it and we have to do it from a mission-oriented analysis, what is it that we need the most, what is it that we don't need the most and go from there in terms of how we prioritize staffing and whatever for the coming year.

I have heard about all of the concerns about projects going forward. And at a later time today, I will discuss a project that I was talking about with the director while we were waiting for during one of the 44 breaks we had during the hearing as the committee recessed as to move on to other interesting issues.

STAFF DIRECTOR MARCUS: Commissioner Yaki, I very much agree with your points. And I would like to respond separately to as many of them

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as I can.

First, you began by calling for a transparency with respect to the determination of our financial condition. I strongly believe that. And I'm sure that everyone --

COMMISSIONER YAKI: I know. And I wasn't accusing you of not.

STAFF DIRECTOR MARCUS: I understand that.

COMMISSIONER YAKI: I was simply restating what I thought was the obvious.

STAFF DIRECTOR MARCUS: I suspect that everyone in this room can agree that I have provided a greater degree of financial transparency than they have ever seen before in this Commission. And I --

COMMISSIONER BRACERAS: A hundred percent.

COMMISSIONER KIRSANOW: Let me tell you in one meeting alone, you have provided more information than I have gotten in three years by a magnitude of three or four-fold.

COMMISSIONER BRACERAS: Yes. I would like to join in that. I joined the Commission three years ago and Pete around the same time. From the

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time we joined, we were continuously asking for this type of information.

And you came before us in the first meeting and confirmed what we had long suspected but never really knew because nobody would tell us. So the increase in transparency is greatly, greatly appreciated.

VICE CHAIRMAN THERNSTROM: And I second that. I've been here for five years -- no -- four. I can't remember.

STAFF DIRECTOR MARCUS: Thank you, commissioners. I am a strong believer and I will continue to provide it. And I tried to provide it to staff even between the last two meetings.

Now, there is a cost to it in the sense that it may cause premature concern in the event that the more optimistic scenarios turn out to be the case. But I, nevertheless, think that it is important to provide that transparency to the commissioners, the staff, and our stakeholders in Congress and elsewhere as well as to the public.

A related but separate point that you made, Commissioner Yaki, deals with the solid basis for the answer that we have. And I think that that

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is critically important. As I provided what I think was an unusually candid description of not just our financial condition but our uncertainty right now, it occurred to me that I would be thinking if I were on the staff, "My God, they're making difficult decisions that will affect me. And they don't yet know the exact situation."

I think it's, nevertheless, important that they know exactly what they know and what we don't know, but I will provide you my assurance that as we go forward to making difficult decisions, we will have the most solid possible basis that we can prior to making those decisions.

Now, I earlier referred to the fact that some of our options will be foreclosed as time goes by. But I would also say that we will not prematurely make decisions that could adversely affect employees in the event that we do not have sufficient information and time.

We will make decisions on a deliberate basis. We will take all measures in order to be able to make decisions while options are still available, but we will not take actions unless we are able to do so clearly.

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I will also say, as I have said to staff, that we are committed to ensuring that before we take any measures that would adversely impact staff, that we will look for all other available avenues for cost cutting, but I have also said with candor that we do not have a lot of those options.

Finally, with respect to your comment that reform measures are different from emergency measures, I would say that that is a very good point.

And I will say they are very different. In fact, I will have to tell you that the time we are dedicated to solving this emergency is delaying us somewhat in undertaking some of the reform measures that we would like to take.

I would like to be focused 100 percent on structural reforms right now, but I have had a very significant amount of my time diverted towards working with our financial people, not on the long-term solutions but on the short-term emergencies. So while the two are connected, they are competing for scarce resources.

CHAIRMAN REYNOLDS: I have a question for you, Ken. This uncertainty, our inability to quantify the deficit, what are we doing in terms of

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putting an accounting system in place that will enable you to answer these types of basic questions?

STAFF DIRECTOR MARCUS: We continue to have largely the same accounting systems, largely the same accounting systems, that we had a few months ago.

Now, we have put pressure on various individuals, including our outside contractors, to solve certain other problems. But the fundamentals, unfortunately, probably can't be changed during the midst of the fiscal year. We still --

CHAIRMAN REYNOLDS: What's the nature of the problem? I mean, we have a system in place now.

Is that correct? We have a ledger. We have a system in place. Are we going to run into this problem again in the future? Do we have all that we need to avoid being in the situation now a year from now?

STAFF DIRECTOR MARCUS: I believe that serious changes in the accounting system will be difficult to impose in the midst of the fiscal year, which is to say we will continue at least until the end of this year to have significant challenges in understanding our finances. We need to make changes,

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but some of the changes probably can't even be begun before October 1.

I will also say that one of the key components of the changes that I have planned to make has been the creation of a new budget sheet position at a GS-15 grade level.

We have announced that position. So far we have had difficulty attracting, even at a relatively high rate of pay, the sorts of candidates that we have wanted.

At this point, while the announcement is open and we have been more aggressive in our efforts to recruit a strong new person, we also are challenged with a prospect of a potential hiring freeze, which might be connected with certain of the options that we have to take. So we do have some real challenges as we look to change the accounting systems.

CHAIRMAN REYNOLDS: Okay. Commissioner Braceras?

COMMISSIONER BRACERAS: Again this goes to Commissioner Yaki's point about the difference between dealing with immediate financial emergencies and reforming our systems for the future.

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As all of you know, we have had a working group on reform put together to deal with some of the procedural issues with the Commission going forward.

And the mandate of the working group that we set up in January was to examine our policies on internal and external communications and as well as project planning and implementation.

And we have at this point come up with a series of recommendations relating to our external and internal communications. We have had a lengthy discussion about project planning and implementation.

Although we have not committed our recommendations to specific proposals yet, that is something we hope to be working on in the next few weeks going forward.

But the idea with respect to project planning and implementation is basically to implement reforms that will improve both the integrity and the quality of our work product.

We specifically did not include budget and financial reform within the jurisdiction of the working group in order to give the staff director time to: A) compile the information that we needed to find out where we stand currently but also to give the staff director some discretion in dealing with

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the financial problems.

So I don't know if this is the right time to move to extend the jurisdiction or the time frame for the working group because previously we had said we were going to come forward in March with our proposals.

We do have a series of 14 proposed reforms, but they deal exclusively with external and internal communications. And we would like more time to basically put our project planning and implementation thoughts into specific proposals. And I don't know if we want to extend the jurisdiction to cover budgetary issues. That's something we can discuss.

We had four commissioners as members of the group. Commissioner Redenbaugh has resigned. So we need to replace a commissioner.

I don't know if this is the proper time to take up these issues about the working group, but I just wanted to raise them.

VICE CHAIRMAN THERNSTROM: I do have a question before we take them up continuing from the prior discussion, Mr. Chairman. So I would at least like to postpone the working group discussion to get

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to ask one more question with respect to the staff director's report and Commissioner Yaki's very, very I think good comments.

This is directed to the staff director. Commissioner Yaki said we've got a very short window of time. And he also said whatever numbers we're working with have to be triple verified so there are no questions about what they are and he added how we got there.

Is there in your view any tension between the short window of time and the necessity to have these, as it were, triple verified numbers? That is, you've been having a lot of difficulty getting your arms around the basic numbers here.

And while I agree with the sentiments that Commissioner Yaki expressed, the question, I'm not sure it's realistic to have those triple verified numbers before you have to make some decisions.

COMMISSIONER YAKI: Well, I'll take double.

(Laughter.)

VICE CHAIRMAN THERNSTROM: You'll take double?

STAFF DIRECTOR MARCUS: Well,

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Commissioner Yaki, you can correct me if I'm wrong, but I believe that what you intended was that we use the best information available?

COMMISSIONER YAKI: Right.

VICE CHAIRMAN THERNSTROM: Yes, but it is going to be short of that perfection that Commissioner Yaki -- of the perfect picture that you drew of indisputable data.

CHAIRMAN REYNOLDS: Well, you both raise points, but I think that the bottom line is that we do have a short time. But we do have an obligation to use the best data available.

So will it be perfect? No. Nothing we do will be perfect. But we are going to use the best available numbers that we can come up with.

VICE CHAIRMAN THERNSTROM: Well, I simply wanted it on the record that what we will be working with is the best available numbers and not the triple verified ones in all likelihood.

CHAIRMAN REYNOLDS: Okay. But let me -- go ahead.

STAFF DIRECTOR MARCUS: If I may just briefly respond? I believe I agree with that, Vice Chairman Thernstrom. What I will say is we will act

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on the best available information but that before we take any action that would adversely affect any single member of the staff, I will make sure that that information is stronger than any information I have seen so far.

There is no way to get perfect information, but I will want to make sure that it is verified to a greater extent than what we have seen in the numbers today.

CHAIRMAN REYNOLDS: Okay. And I'd like to go back to Jennifer's point. Jennifer, I think that we should just hold off and finish with Ken's report and then revisit the issue on the table.

COMMISSIONER BRACERAS: Right. I just wanted to make it clear for the record that the emergency measures that the staff director is taking and may need to take going forward does not preclude reform.

And we are in the process of reform. We started that process in January. And I recognize that Commissioner Redenbaugh was disappointed with the pace of that reform. However, it's only been two months, and we have already tackled a whole host of issues. And we are going forward to tackle more of

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them. And all of us here are committed to reforming the agency's processes going forward.

So I just want to make clear that that is on the agenda for today and for the indefinite future, that nothing we're talking about right now precludes the ongoing work of reform, of institutional reform.

CHAIRMAN REYNOLDS: Sure. Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I was just going to say that I think, as Commissioner Yaki said, we have been kind of dancing around an issue, and that is layoffs.

I've had the unpleasant task of having to counsel hundreds of companies on that very issue. And you never get perfect information. It never happens.

The unpleasant truth is that sometimes any of these enterprises, companies have got to take actions with the best information they have. And, unfortunately, I think in this circumstance, you are between a rock and a hard place, which dictates that you err on the side of making sure that we come in within budget.

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That is a difficult prospect. It is a difficult thing to discharge for any staff director, for anybody in an executive position. But I think that is the ultimate mandate.

STAFF DIRECTOR MARCUS: Thank you.

Let me just say quickly in response to Commissioner Kirsanow that I agree with that but to emphasize that we have been trying to provide an extraordinary amount of candor, including discussing potentialities that may not come to fruition, and that everyone should understand that while we are looking at all possible alternatives, certainly no decisions have been made yet with respect to layoffs or anything else. But we are looking at some very tough issues.

If those are the questions with respect to the financial condition, I will continue with the staff director's report.

CHAIRMAN REYNOLDS: Yes.

STAFF DIRECTOR MARCUS: Commissioner Kirsanow had referred earlier to administrative instructions that I have issued which have not previously been discussed in a Commission meeting. And I'd like to say just a word about it because I

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think this relates very much to Commissioner Braceras' concern that we not stop in our reform efforts just because we have an emergency going on.

I think it is important to say that in just the first brief three months, we have already tackled a large number of problems based on findings of the GAO.

Now, I can't in open session go into too much detail about how our reforms deal with recommendations of GAO. What I will say is this. We are implementing over 20 reform measures that relate to recommendations of the GAO in that at least some of them not only address findings of GAO but address findings of GAO that are not yet even final and formally announced.

So we are trying to be as aggressive as possible, not just reacting to what has happened in the past but looking at the best information we have available and trying to get ahead of them.

I think that this is an indication that we are so serious about reform that we are tackling issues that haven't even yet become finally public in order to make sure that we can bring our house into order.

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Commissioner Yaki had pointed out a few moments ago that there is a difference between emergency planning and long-term structural reform. And I had indicated in response to that that, in fact, dealing with this emergency may cause some difficulty in dealing with the long-term structural problem.

One way in which I have anticipated that problem is by creating a new senior-level position of a person at a high level who can focus on some of the long-term structural needs.

As I am focusing with our director of management and other of our management and financial staff on the emergencies, it is important that there be at least one high-level person who is looking at the long term in helping in reforms.

So I do have a new position that I am creating of associate deputy staff director, which will be a management-level person who will be looking at such matters as GAO implementation. The hope is that there will be one person who is not diverting attention to emergencies and who can help focus on the long term.

Finally, I have been asked to say a word

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about congressional compliance. We continue to work as hard as we can, not only to meet the obligations imposed on us by our oversight committees but to exceed them.

I had indicated in prior meetings that staff had been working around the clock to try and meet deadlines. Fortunately, at least for a little while, that has slowed down.

But I would say that, even since the last meeting, there have been multiple document productions given to Congress because we think it is so important to cooperate with the oversight committees.

In fact, not only have we been meeting our deadlines for document production, but over the last few weeks, we have gone ahead of time based on a concern expressed to me by House oversight counsel that they would like it quicker if possible.

And we have delivered to Congress some documents that they asked us to provide by April. And I believe some of the documents have met at May timetable. So we have, in fact, not only been working to meet but also to exceed our deadlines from Congress, thanks to extraordinary work from a large

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number of staffers, including our custodian of records, Barbara Fontana, and solicitor, Emma Monroig.

We are aware now, as of yesterday, that there will be another subpoena issued to the Commission. As I understand it, it is likely to look like the last one except that it will be renewed.

I anticipate that this will involve potentially substantial additional work in order to make sure that we comply with the last one.

Now, some have asked me, "Well, if you have already handed over virtually all of the paper you have got and this is a renewal, how could it be more?" The problem that we have is that since my arrival, we have done everything we can to fully respond to those pending document requests for which we're responsible as well as to attempt to go back and certify our completion.

However, the fact is that we do not entirely know what my predecessor did and didn't produce prior to my arrival. We do not have records indicating what was produced, what wasn't produced.

So with respect to those portions of the subpoena that were dealt with earlier, we may have

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additional need for resources to be diverted to comply with that portion of the subpoena.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Just a question. Are the remaining documents Bates stamped?

STAFF DIRECTOR MARCUS: We are Bates stamping all documents, keeping a record and an extra copy currently.

COMMISSIONER KIRSANOW: Good.

STAFF DIRECTOR MARCUS: As for the prior production, we do not have a complete record. And I might have to defer to career staff to address whether there was Bates stamping and, if so, whether it was page by page or document by document. I will defer to our solicitor, Emma Monroig.

MS. MONROIG: Yes. Good morning. The documents that were produced to Congress before mid December were not Bates stamped. And we don't know what they were because copies were not kept or identified as a production, nor was there a list of the documents produced.

The production in late December done by the General Counsel was Bates stamped, and there are

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copies. And the ones afterwards that have been done during the current year are also Bates stamped. And we know what was produced because we have a copy of them.

But the initial ones, we have, you know -- and some of the notes of the documents that have been left have said that the production in some categories were incomplete. That is why there is an element of uncertainty.

COMMISSIONER BRACERAS: I'm sorry. Who was responsible for supervising the production, the earlier productions?

MS. MONROIG: Well, apparently the assistant to the staff director, Alex Sun, was a person responsible. And the letters going out are signed by the staff director, Les Jin.

COMMISSIONER BRACERAS: Okay.

COMMISSIONER KIRSANOW: So would it be fair to say that we may be duplicating at this point?

STAFF DIRECTOR MARCUS: It's a little premature without actually seeing the subpoena and communicating with staff, but my hope is that we will be able to work together with them to be able to determine from their records what they have and what

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they don't have.

I don't know yet entirely what sort of indexing they might be able to share with us, but my hope is they will work with us to minimize the additional cost and expense. And I'm certainly seeing from facial expressions that oversight counsel is agreeable to that.

CHAIRMAN REYNOLDS: Well, before you go on, going forward, I think it is extremely important that we have good communication with the Oversight Committee to ensure that the documents that we provide are satisfactory.

And if we cannot provide a complete response, then we should be prepared to offer up our reasons for being unable to provide a complete response.

Yes?

VICE CHAIRMAN THERNSTROM: Do we know the condition of the records of the subcommittee, as opposed to our records?

STAFF DIRECTOR MARCUS: I think we're going to have to have further discussions with the subcommittee.

The one last point that I intended to

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make in my report with respect to congressional compliance was to answer a question posed to me last meeting by Commissioner Yaki. He asked me if we could determine the costs that we have incurred during congressional compliance.

That cost is, in part, a matter of out of pocket that we can determine with actual numbers and is, in part, a matter of staff time, which we have needed after the fact in some cases to estimate based on beliefs about hours worked.

The analysis that we have done estimates that we have had to incur costs of approximately \$123,000 in complying with the congressional subpoena.

That is my report.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I think before I had some additional questions, and I know Jennifer has got some motions and so do I.

A few things. One is with respect to the cost of complying with oversight, I view that as part of reform, frankly. I view that as a cost that is unavoidable. And I think we're going to comply with

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that, regardless of the cost. It causes problems possibly, but that is something that we will see.

Second, it strikes me that this informational vacuum that we have places us in a very difficult position you have indicated. I guess I'm repeating what you said, but I'm very concerned that we're going to be able to make accurate assessments about the measures that we need to take on an agency basis because of that informational vacuum.

Does the staff director have any idea as to how we are going to make these assessments given that informational vacuum?

STAFF DIRECTOR MARCUS: Commissioner Kirsanow, you are asking me whether I know how we will be able to get the accurate information we need in order to take the emergency measures to deal with the financial?

COMMISSIONER KIRSANOW: Right, right.

STAFF DIRECTOR MARCUS: Well, I have already begun adding additional staff to look at the financial numbers and to check and double check. In some cases, these are not financial staff, but they're smart people who can work with me on it.

And we are doing the best we can now

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focusing all of our attention on this and making this emergency measure first priority to essentially be our top priority and even at the expense of some of the more long-term plans that we are doing.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: I want to put on the table I think something that has been implicit in everything that has been discussed today. And I know it has been the subject of discussion between the chair and the staff director. But it's something that we haven't stated. The only person I saw that stated this was Commissioner Yaki in his testimony yesterday.

And so when he wanted us to be aware of and at least articulate the difference between our emergency measures and our reform measures, given what he said yesterday, I know he was talking about doing something in the context of enduring that we consider the context. And that is, whatever we do should be narrowly tailored so that it does not materially hinder the public function of our Commission.

I'm simply paraphrasing what he said yesterday because, as I view, we're not going to be

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judged in the short term. We're going to be judged in the long term on whether or not we are able to produce a quality product over the long term.

So what I would like for the staff director is that I'm not going to micromanage you, and you know that. What I want, though, is some assurance when you make recommendations to tell us that it will not materially hinder our public function and if you ever make a recommendation that you think will, that you tell us that and we put those issues on the table because that, from my perspective, is important and I don't want to lose sight of that as we discuss these important short-term issues.

STAFF DIRECTOR MARCUS: Commissioner Taylor, my plan as we go forward on these reforms is to institute measures that will strengthen the institution so as to improve its ability to achieve its mission.

I don't see a tension between reform measures and mission accomplishment. I believe that the long-term measures that we are doing will make this a stronger agency that will be better able to accomplish its long-term measures.

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For that matter, I also see our compliance with a congressional request as being in, as Commissioner Kirsanow indicated, a part of our reform. And I believe that as we work together with them, that that, too, will enable us better to achieve our mission.

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I'm wondering now if it wouldn't be wise to move up items 6 and 7 on the agenda, before we launch into program planning, to sort of continue our discussion of reform and operations, --

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER BRACERAS: -- instead of totally switching gears for project planning.

CHAIRMAN REYNOLDS: Project planning, after this discussion today, it seems to me that the new ideas that we have been considering, that we should not move forward until we know whether they will entail additional costs.

We have a statutory obligation to produce one report a year. And that report will be the Adarand report. That decision was already made in

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the past.

COMMISSIONER BRACERAS: Well, there was a motion circulated that we do need to address related to the Adarand report, --

CHAIRMAN REYNOLDS: Right.

COMMISSIONER BRACERAS: -- which is to expand the focus of the report. And this body needs to discuss that and decide whether or not to authorize that.

CHAIRMAN REYNOLDS: Under program --

COMMISSIONER BRACERAS: My question here was only what order we should do that in.

CHAIRMAN REYNOLDS: Well, what I'm suggesting is that program planning, that the initial plan was to discuss all of the programmatic activities, all of the concepts --

COMMISSIONER BRACERAS: Right.

CHAIRMAN REYNOLDS: -- that we have been considering. I'm suggesting that that has been narrowed until we get a handle on the costs associated with each of those projects.

COMMISSIONER BRACERAS: So are we moving to defer that discussion? Is that --

CHAIRMAN REYNOLDS: With the exception of

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the statutory report, the Adarand report.

VICE CHAIRMAN THERNSTROM: But, as Commissioner Braceras has just said, the Adarand report, there are motions to amend it. Those have to be discussed.

CHAIRMAN REYNOLDS: Yes, yes. What I am saying is --

COMMISSIONER BRACERAS: Right. Let me make a motion, then. I move to -- hold on. I've just been handed something. Okay. I move to defer discussion of program planning until the April meeting with the exception of the change in focus on the Adarand project.

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Okay. Any discussion?

COMMISSIONER YAKI: Point of clarification. Tied in that motion, Commissioner, was a change of the agenda to move it to the back of the agenda today or --

COMMISSIONER BRACERAS: I was just going to do that in a separate motion.

COMMISSIONER YAKI: Okay.

COMMISSIONER BRACERAS: So the first

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motion is simply to defer program planning with the exception of Adarand until April.

CHAIRMAN REYNOLDS: Any discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor?

(Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: All in opposition?

(No response.)

COMMISSIONER BRACERAS: Okay. So my second motion, then, is to first move the discussion of the Adarand project until after the management and operations discussion and the working group on reform discussion.

CHAIRMAN REYNOLDS: A second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor?

(Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: Any opposition?

(No response.)

CHAIRMAN REYNOLDS: Motion passes. Yes?

COMMISSIONER KIRSANOW: Still not done with the staff director's report. I just have a few

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more questions with respect to the staff director.

COMMISSIONER BRACERAS: Oh, I'm sorry. I thought that --

COMMISSIONER KIRSANOW: That's okay. I want to go back to operational baseline, where we are right now. I think earlier on, you made reference to some of the reports that we're currently working on and that one was the voting rights report. We're using a contractor to discharge that function?

STAFF DIRECTOR MARCUS: Yes, in part, Commissioner Kirsanow. The Commission previously, as I understand it, approved a two-part Voting Rights Act authorization study. The first part for fiscal year 2005 is an OGC project looking at legal aspects of voter rights authorization.

The fiscal year 2006 is an Office of Civil Rights Evaluation project dealing with such matters as access to voting by persons of limited English proficiency and persons with disabilities.

The first part, which OGC is responsible for, was contracted out to a contractor.

COMMISSIONER KIRSANOW: Who is the contractor?

STAFF DIRECTOR MARCUS: The contractor's

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name is Mark Posner.

VICE CHAIRMAN THERNSTROM: And his work is done. Is that correct?

STAFF DIRECTOR MARCUS: He has issued us a document that is characterized as a final report, yes.

CHAIRMAN REYNOLDS: And I believe all payments have been made.

Okay. All right. Next up, management and operations. And have some motions from Commissioner Kirsanow.

COMMISSIONER KIRSANOW: I think Commissioner Braceras had a motion with respect to extending the time frame for working group on reform. And I'll let her go forward on that one before I enter my motions.

CHAIRMAN REYNOLDS: That's fine.

VII. REPORT OF THE WORKING GROUP ON REFORM

COMMISSIONER BRACERAS: Okay. Well, as I said before, the working group on reform was established at the January meeting. Its jurisdiction was to discuss external and internal communications and project, process, and implementation.

I noted earlier that we have completed

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our work on two of the three of those items. And I'd like to move now that we extend the time frame for the working group on reform until May.

We have put together a list of recommended rule changes on the first two agenda items, but I think perhaps it would be best to bring forward all of our proposed rule changes at one time.

And we can do that in May, at which point we will have detailed project planning or project implementation template to bring forward as well.

CHAIRMAN REYNOLDS: Okay. Is there a second?

COMMISSIONER KIRSANOW: Second.

CHAIRMAN REYNOLDS: Discussion?

(No response.)

CHAIRMAN REYNOLDS: All in favor?

(Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

CHAIRMAN REYNOLDS: The motion passes.

COMMISSIONER BRACERAS: Since Commissioner Redenbaugh has resigned by the Commission and he was a member of the working group on reform, I'd like to move at this time that we add

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a new commissioner to the working group.

CHAIRMAN REYNOLDS: Second?

VICE CHAIRMAN THERNSTROM: I don't think it was actually a motion we voted on originally, but I could be wrong.

COMMISSIONER KIRSANOW: I think wasn't it the chair?

VICE CHAIRMAN THERNSTROM: The chair simply --

COMMISSIONER KIRSANOW: I think the chair should just --

VICE CHAIRMAN THERNSTROM: The chair simply appointed it. And I suggest --

COMMISSIONER BRACERAS: Okay. So then I'd like to suggest that the chair appoint a new member of the working group. And I would like to suggest that it be Commissioner Yaki.

CHAIRMAN REYNOLDS: Commissioner Yaki, are you agreeable to being drafted?

COMMISSIONER YAKI: I really have no choice.

(Laughter.)

COMMISSIONER BRACERAS: Sure, you do.

COMMISSIONER YAKI: I'm the new guy.

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COMMISSIONER BRACERAS: You could

VICE CHAIRMAN THERNSTROM: Yes. And --

COMMISSIONER BRACERAS: You could suggest
someone else --

COMMISSIONER YAKI: A player to be named
later.

VICE CHAIRMAN THERNSTROM: And I wonder
if you would also designate Jennifer Braceras as the
chair of the working group, of the reconstituted
working group.

CHAIRMAN REYNOLDS: Okay. Jennifer, do
you have any objections?

COMMISSIONER BRACERAS: No objections.

CHAIRMAN REYNOLDS: All right. It's
done.

Commissioner Kirsanow?

VI. MANAGEMENT AND OPERATIONS

COMMISSIONER KIRSANOW: Yes. I do have a
few motions of my own, as stipulated earlier, about a
week ago. There were some questions with respect to
them, and I am prepared to answer them.

What I will do is I think everyone has a
copy of it. Again, this was e-mailed to everybody in
terms of the proposed motion. I will read them into

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the record and then try to explain or answer some of the questions that were posed offline and probably have discussion on it.

As a preface to these motions, they are, in large part, a function of some of the things that were raised by the staff director in his report in terms of transparency, lack of information.

We don't know where we are on a number of matters because it appears as if records are incomplete. Institutional controls have not been in place.

In addition, these are matters that we have been discussing for quite some time now. I think that many commissioners were in agreement that some form of this motion was imperative.

I think that going to Commissioner Bracer's point about Commissioner Redenbaugh was frustrated with the pace of reform when we have only been working on this for a couple of months now when, frankly, there hasn't been any reform, significant reform, in 12 years. And now we are I think moving forward on such matters.

Let me just read this. And then I will answer some of the questions that --

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COMMISSIONER BRACERAS: I'm sorry. You said "motions," plural, but this appears to be just one. You handed them out separately?

COMMISSIONER KIRSANOW: Yes. They're going to go out one by one so that you --

COMMISSIONER BRACERAS: Okay.

COMMISSIONER KIRSANOW: This is actually one motion.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Yes?

CHAIRMAN REYNOLDS: Now, what I have here, I have a motion with three subparts.

COMMISSIONER KIRSANOW: Right.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRMAN THERNSTROM: And that is one motion? You're not breaking that down into three motions?

COMMISSIONER KIRSANOW: Right, yes. Financial and operational controls. The Commission shall take all steps necessary and proper to: A) implement on an expedited manner a time schedule all outstanding and forthcoming recommendations from the Governmental Accountability Office and the Office of

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Personnel Management certified by the Commission at its April 2005 meeting; B) pertain I have here "exceptionally" qualified accounting firm to conduct the comprehensive financial audit of the Commission's books for fiscal years 2003, 2004 to be submitted no later than January 1, 2006; and C) solicit the Office of Personnel Management to conduct a desk audit for the Commission's headquarters and regional offices.

Now, based on some of the discussions we had today, I think some of these motions, subpart C motions, need to be rejiggered a bit. I'd also like to address some of the concerns that were raised before related to these motions. There were some questions related to them.

First of all, the staff director has already gone a long way toward implementing some of these measures, most notably the GAO recommendations.

I commend the staff director for doing that.

Commissioner Thernstrom had expressed a concern that the staff director given all of the other labors that he is facing may not be able to implement these reforms in a nine-month schedule.

I trust the staff director to be able to do that since he was able to do 20 of 29 in fairly

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short order. Even if the other nine are a little bit more draconian or difficult to implement, I also think that this Commission is one that would respect the staff director's report to us at any point asking for more time. But I think that these things can be implemented within nine months.

I think given the circumstances that the Commission is in, that it is important for us to move as expeditiously as possible. And when I say "forthcoming recommendations from the Government Accountability Office," we have a draft recommendation from the GAO. There may be others coming down the pike.

And when I say "certified," this is another question that was raised by Commissioner Thernstrom, what does that mean? What I mean by that is we don't necessarily know all of the recommendations that GAO may come up with.

I don't want to be delegating to GAO also the prerogatives of the Commission. So we will look at those GAO recommendations, certify them as recommendations that we are going to implement. And then at that point, the staff director would move forward to implement them.

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COMMISSIONER BRACERAS: Well, you didn't formally enter a discussion period, correct?

CHAIRMAN REYNOLDS: That's right.

COMMISSIONER BRACERAS: It needs to be moved. It needs to be seconded. And we need to --

CHAIRMAN REYNOLDS: And also, Pete, I would suggest --

COMMISSIONER BRACERAS: I want to be heard first when we discuss.

CHAIRMAN REYNOLDS: Okay. Pete, are you sure you want to have a package deal in here?

COMMISSIONER KIRSANOW: Yes, I do.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER KIRSANOW: With respect to retaining an exceptionally qualified accounting firm to conduct a comprehensive financial audit, a few points.

Commissioner Thernstrom had a question as to what constitutes exceptionally qualified. I would leave that to the staff director.

CHAIRMAN REYNOLDS: I'm sorry. How about this, Pete? Why don't we have a motion, have it seconded, start the discussion, and vote on it?

COMMISSIONER KIRSANOW: If you wish. I

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was trying to address some of the concerns that were e-mailed in the e-mail traffic so that we could get ahead.

COMMISSIONER BRACERAS: Right. My assistant just reminds me that the maker of the motion always has the first opportunity to discuss the motion. So why don't we just make the motions, second them, and then you can continue.

COMMISSIONER KIRSANOW: Well, I would make the motion that the motion I have just read into the record be adopted.

CHAIRMAN REYNOLDS: Second?

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Discussion?

COMMISSIONER KIRSANOW: Okay. With respect to B, I would leave it to the discussion of the staff director to come up with what he considers to be an exceptionally qualified accounting firm. And I think he is perfectly suited to make that determination. I don't think we need to micromanage.

This is not a reflection on the accounting firm that we're currently using. I had a discussion with that person, who I think is very well-suited to doing what he is doing right now. And

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I think he had indicated that he may not be in a position to undertake a full-scope audit.

In discussions also with the chair, there was a suggestion made that this be a forensic audit.

I am agnostic about that. Based on what I have heard today, that might be something that makes sense, but I have no handle on how much that would cost, what that would entail. And so at this point, I would simply go with a full audit, as generally understood by the account industry.

Third, solicit the Office of Personnel Management to conduct a desk audit of Commission headquarters and regional offices. I will say to you that after I made this motion and based on discussion we had today, this one, this subpart, might suitably be deferred until such time as this so-called window, decisional window, that the staff director faces right now as either closed or become a little bit more transparent, no pun intended. I think until such time as that decision is made, possibly subpart C should be held in abeyance. I'm willing to retain that if others think that that is appropriate.

CHAIRMAN REYNOLDS: Okay. Commissioner Braceras?

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COMMISSIONER BRACERAS: Okay. First of all, I would like to say that I agree wholeheartedly with the spirit of this motion. And I hope that we can pass if not this particular motion, then something similar.

I also want to say, however, that in passing a motion relating to financial and operational controls or in voting for such a motion, I in no way mean to suggest that the staff director isn't already taking strenuous actions to address these concerns.

I understand why it might be wise to formally adopt this motion, but I want to be perfectly clear that the staff director has my full confidence. I know that he has been tackling this. He hit the ground running from the second he got here and has been struggling to grapple with the financial and operational mess that the previous administration left us in. So I just want to make clear my confidence in and support for the staff director's ongoing efforts in this regard.

I would also like to offer some amendments to this motion. With respect to the all outstanding and forthcoming recommendations from GAO,

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I really don't think we can say all forthcoming recommendations when we do not know what it is they could conceivably recommend down the road.

All forthcoming means in perpetuity years from now. So I think I would recommend changing the language to say "all final and draft recommendations" because we know what they are.

I guess still with respect to A, I would ask the staff director before voting to approve this language, which I think I can do, I would want to hear from the staff director on whether there are any final or draft recommendations of the GAO that he believes are either not feasible or with which he disagrees or that there is any reason why he thinks they might be difficult or unwise to implement. If there aren't, then --

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER BRACERAS: -- just for the effect of the manager, I'd like to know if he anticipates any difficulty with any particular recommendations.

VICE CHAIRMAN THERNSTROM: And especially within the nine-month period.

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COMMISSIONER KIRSANOW: Just to clarify, Commissioner Braceras -- and I have no problems with substituting "final" and "draft," but that is why I said as certified by the Commission.

I don't think that we're here to certify any of these things at this point. I think if the staff director wants to take a look at it, make a determination, report back to us. I don't want to delegate necessarily to GAO recommendations.

COMMISSIONER BRACERAS: That's fine. That's fine.

COMMISSIONER KIRSANOW: Certification also means that anything that is forthcoming -- and it's going to have to be forthcoming before the April meeting -- are things that we adopt or at least discuss the possibility of adopting.

COMMISSIONER BRACERAS: That's fine.

COMMISSIONER KIRSANOW: But you don't substitute "final" and "draft." That's --

COMMISSIONER BRACERAS: I think, just to clarify, I would like to substitute the words "final" and "draft" for the words "outstanding" and "forthcoming." And I would like to insert the word "as" after "Office of Personnel Management" and

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before "certified." So it would read "All final and draft recommendations from the GAO and OPM as certified by the Commission at its April 2005 meeting."

COMMISSIONER KIRSANOW: I'm agreeable to that.

CHAIRMAN REYNOLDS: Okay. At this point, Ken, would you respond to Commissioner Bracer's --

COMMISSIONER BRACER: Hold on. I think Commissioner Meeks wanted to --

COMMISSIONER MEEKS: Yes, please. I mean, C I think needs to be deferred. A, I would suggest that the commissioners do not need a motion that the staff director certainly probably appends. I mean, I don't have any objection.

COMMISSIONER BRACER: Right.

COMMISSIONER MEEKS: But I would assume that he shouldn't be the staff director if he's not going to implement these things without commissioners passing a motion to do that. B fine. That will be fine.

COMMISSIONER KIRSANOW: Just to respond to Commissioner Meeks, I think it's important for the Commission to provide direction to the staff director

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on some of these GAO matters which impact on policy.
That is our prerogative.

I am in full agreement with what the staff director has done so far. I concur with Commissioner Braceras that the staff director has done more in three months than I have seen in three years.

But this is also a matter of our statutory framework and who does what. Maybe I'm being a little bit too technical, but I do believe it's the prerogative of the Commission to instruct the staff director on matters pertaining to GAO recommendations.

And I also think, without getting too esoteric about it, there are constitutional concerns with respect to the delegation of power. We don't simply adopt things from GAO. We make an independent assessment as to what recommendations we're going to implement. That's a policy issue that falls within the prerogative of the Commission.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Yes. Just one quick clarification and then a comment. So the author of the motion and the author of the amendment, if I

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understand it correctly, what we will do in April is we will decide of the final and draft which ones we will wish to adopt?

COMMISSIONER KIRSANOW: Correct.

COMMISSIONER YAKI: It goes to the point that Commissioner Taylor raised that I raised yesterday, which is I want to make sure that there is nothing in there that unduly inhibits our mission in there as well. Then I am comfortable. Then I am very comfortable.

COMMISSIONER BRACERAS: I don't think that is clear from this particular language. And I agree with you. I'm comfortable with the way you just phrased it, but I don't think it's clear from the way it is drafted that we're going to have a discussion in April and we will vote on the particular recommendations that we want to implement.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER YAKI: I just had a comment, but if you wanted to finish my clarification, go ahead. That's fine.

VICE CHAIRMAN THERNSTROM: Well, I want to ask you whether you have got in mind some specific language that would make that that would clarify.

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COMMISSIONER YAKI: I would offer a friendly amendment that to implement on the next nine months' schedule all final and draft recommendations from the Government Accountability and Office of Personnel Management adopted by the Commission at its April 2005 meeting.

COMMISSIONER KIRSANOW: I'm agreeable to that. Just a point. I am as a lawyer in favor of precision, but two points with respect to that. The first is, again, I think these are all fine amendments. I am agreeable to them.

On a forward basis with respect to these motions, I think we should offer motions with precision, but we should also keep in mind that these are not motions made through a court and we are not drafting legislation.

COMMISSIONER YAKI: I understand.

COMMISSIONER KIRSANOW: And I say that because I think it's imperative that we not get too bogged down in minutiae. We are a collegial body here. I think on the record, the transcript will be reflective of the intent of this body.

I don't want to go back to the old days of just kind of freewheeling motions being made, no

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one remembering what the motions were about. But, by the same token, I think that there is a balance to be struck.

COMMISSIONER YAKI: May I take back my time?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER YAKI: But I agree. I was just simply responding to Commissioner Thernstrom's request. But I was fully in agreement that I thought the intent was very clear.

The only concern I have about the package has to do with B. And B I'm just worried about we are deferring project planning because we want to make sure we have costs allocated, we are sure what the budget is available for each of those things. I understand the spirit of B. I am just worried about the cost of B given this particular time in our agency's budgetary drama.

CHAIRMAN REYNOLDS: That's a good point.

And it seems to me that the first thing that we have to do is decide that we want to do it. And then as to the cost associated with having a full-blown review conducted, we're going to have to get some cost estimates. And we may have to revisit this

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issue. And we may have to go and try to seek additional funds in order to get a full-blown review completed.

Yes?

VICE CHAIRMAN THERNSTROM: And does that suggest perhaps a rewording of point B? And again I turn to Commissioner Yaki for suggested rewording that takes into account the fact that there will be costs associated and they need to be known.

CHAIRMAN REYNOLDS: Well, at this point, though, I think that Pete, Commissioner Kirsanow, makes a good point. We cannot nail down all of the nuances. I think that we're going to have to trust each other in that -- I mean, I think that all around the table here, I think that we all understand that if we determine that we can't afford to do this, then the issue, we must revisit the issue.

It seems to me that we are going to have to find the money somewhere. Either we will have to seek additional funds from Congress or we will have to review the '06 budget.

But the bottom line is that I don't think that we should spend a lot of time trying to nail down all of the variables because we can't because as

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long as there is not an indication that there is a different understanding amongst the commissioners, I think that we understand that this is going to cost us money and that we may have some difficulty paying for it.

COMMISSIONER KIRSANOW: Yes, Mr. Chair. I mean, I drafted this fully cognizant of the fact that we're in financial straits but also with an understanding that there are certain imperatives.

Getting a handle on the nature of the financial straits is one of those imperatives. I also trust the staff director based on my brief association with him to be able to report back to us pretty quickly as to what constraints we may have in terms of this financial audit. So we can revisit this particular issue.

Nonetheless, having said all of that, I can't emphasize enough how important I think based on the reports given by the staff director that we engage in full financial audit of this organization for, if no other reason, we don't even know what we don't know.

VICE CHAIRMAN THERNSTROM: Commissioner Yaki has his hand up.

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COMMISSIONER YAKI: Based on the representation of Commissioner Kirsanow and the Chair, then I have no problem with B at this point.

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I guess I am just wondering whether we should separate out A, B, and C at this point and vote on them separately and discuss them separately.

CHAIRMAN REYNOLDS: Well, I posed that question to Commissioner Kirsanow once before. Have you --

COMMISSIONER KIRSANOW: I would like to do them as a package --

COMMISSIONER BRACERAS: Okay.

COMMISSIONER KIRSANOW: -- with one exception. I think, as I indicated before, I'm amenable to C being backed on this only because I'm not sure. I still think we are in a informational vacuum that makes discussion of this perhaps premature, although we could implement it on a contingent basis. That is, you know, as of the April meeting, we could possibly implement this.

VICE CHAIRMAN THERNSTROM: And as a

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friendly amendment, does this mean you would accept a friendly amendment based on what Commissioner Meeks has said, that we defer C until --

COMMISSIONER KIRSANOW: I would defer it until April.

VICE CHAIRMAN THERNSTROM: Until April.

COMMISSIONER KIRSANOW: As quickly as possible.

VICE CHAIRMAN THERNSTROM: Okay. So that C, then, is off the table for this meeting.

COMMISSIONER KIRSANOW: Yes. Let's back this out until April. I will reintroduce it in April because I think by that time, we will have a handle on what the transition is like.

VICE CHAIRMAN THERNSTROM: So that the package becomes simply A and B.

COMMISSIONER BRACERAS: And just to be clear what we're voting on right now, we're deleting C from what we're voting on now. And I still have problems with the language of A. And I am sorry. I am a lawyer. I feel that what I vote on has to be precise.

I think what you're really saying is that at the April 2005 Commission meeting, we will vote on

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the implementation of GAO and OPM recommendations and that all recommendations approved at that meeting will be implemented within nine months.

COMMISSIONER KIRSANOW: Right.

COMMISSIONER BRACERAS: And I guess I would just like to phrase it that way because I'm uncomfortable with the way it is right now. It just seems to give the impression that we're voting to approve recommendations that we haven't yet discussed. And I just would rather have it phrased in a way that I am comfortable with.

CHAIRMAN REYNOLDS: Commissioner Kirsanow, do you have any objections to the language that she used?

VICE CHAIRMAN THERNSTROM: Could you repeat that language, Jennifer?

COMMISSIONER BRACERAS: Yes. At the April 2005 Commission meeting, the Commission will vote to adopt recommendations of the General Accounting Office and Office of Personnel Management.

All recommendations that are adopted at the April meeting will be implemented within a nine-month time frame.

COMMISSIONER KIRSANOW: That's fine. I

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think, you know, the transcript reflects that. I don't have a problem with that.

VICE CHAIRMAN THERNSTROM: I think Commissioner Meeks said something.

COMMISSIONER MEEKS: And does that leave B in, then, too?

COMMISSIONER KIRSANOW: Yes, B is --

COMMISSIONER BRACERAS: I was just trying to tackle them one at a time.

COMMISSIONER MEEKS: Yes. Well, I -- never mind.

COMMISSIONER BRACERAS: No. Please.

COMMISSIONER MEEKS: Well, I was just thinking and sort of contemplating making a motion to table this until April. And at that time, we will know what GAO's recommendations are probably. And we possibly could know what the cost of B will be.

I mean, there are just so many uncertainties right now about this motion, that it could get changed. I mean, I'm --

CHAIRMAN REYNOLDS: Yes, Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I understand Commissioner Meeks' point. And she makes an

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interesting point. I don't think that there is a reason to table at this point. I think we all understand what is being proposed here. And I think there are only a few uncertainties.

We do know, in large part, what GAO is going to do. We have the draft. We know what that is about. We doubt that it is going to change significantly.

I think we will be prepared by April to do it. I'd like to move as quickly as possible. I think one of the problems that we have had on this Commission, at least in the three years that I have been here, is we have deferred things, whether it be expenses, motions. And I think we need to act quickly.

I don't think we're acting peremptorily.

I don't think we're acting hastily. I think we are acting appropriately in adopting these motions now so the minute we can hit the ground running, I don't think there is any uncertainty as to what is being adopted.

COMMISSIONER BRACERAS: Yes. I think with respect to A now, all we are doing is agreeing to take up the recommendations in April. And the

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ones we agree to we're setting the time frame.

VICE CHAIRMAN THERNSTROM: And is my understanding correct that the definition of exceptionally qualified is that which the staff director arrives at in the context of our budgetary constraints and any other considerations, professional judgment?

COMMISSIONER KIRSANOW: In his professional judgment, whoever is exceptionally qualified to do this. You know, I am not someone who can go down a list of accountants or auditing firms and tell you who is the best. I leave that to the staff director.

COMMISSIONER BRACERAS: Okay. Should we move the question?

CHAIRMAN REYNOLDS: Any other comments, concerns, questions?

COMMISSIONER YAKI: I move it as amended.

VICE CHAIRMAN THERNSTROM: Second.

CHAIRMAN REYNOLDS: Okay. Let's vote. All in favor?

(Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

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CHAIRMAN REYNOLDS: The motion passes.

COMMISSIONER KIRSANOW: I have a second motion. And I would also give an explanation of this one also based on I think Commissioner Bracer's question related to -- I'll read it into the record and then explain.

COMMISSIONER YAKI: Is this the IG one?

COMMISSIONER KIRSANOW: Yes, this is the Inspector General motion. Commissioner Yaki, you don't have this one because this one reflects some of the concerns that were raised by Commissioner Bracer in e-mail traffic but also substantially what the staff director had said in discussions I had with him and also what he said today.

This has to do with governance and accountability. As soon as practical, the staff director shall take all steps necessary and proper to retain the services of an Inspector General to identify: one, whether the Commission unlawfully deferred any payments that properly should have been paid in fiscal year 2004 to fiscal year 2005 in violation of the Anti-Deficiency Act; -- and that is a colloquialism -- two, whether the Commission deferred any payments that properly should have been

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paid in the fiscal year 2003 to fiscal year 2004 or 2005 in violation of the Anti-Deficiency Act; and, three, report findings and recommendations to the Commission on a schedule to be determined by the Inspector General in conjunction with the chairman and staff director.

The original motion had contemplated the appointment of an Inspector General. And the staff director had already gone to great lengths investigating the ability of the Commission to do so, both financially, legally, and practically, what Inspector Generals are able to do.

Commissioner Braceras was concerned that there may not be legal underpinnings. I researched that in terms of having an Inspector General or having one detailed.

My understanding is under the Economy Act of 1932 and by provision with the General Services Administration, it is standard practice or at least it is commonplace to have an Inspector General detailed from another agency. It's done on a fairly regular basis. We have got a memorandum of understanding with the General Services Administration to do just that.

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I have narrowed the focus of this because the staff director had indicated that, first of all, getting an Inspector General to do all of the things that were in the original motion; that is, frankly, turn the place upside down, is something that he was not able to convince anybody to do.

It seems based on some of the discussions we have had already today that a lot of people run screaming from this agency faced with the prospect of trying to help us out because they think that it is something that might not even be feasible.

So I have narrowed the focus because I do have concerns that one of the reasons we are in the fix we are in is because payments are being placed in our watch, so to speak, and also because we don't know to what extent those payments have been placed on our watch. We don't have those controls in place.

The forensics aren't there. And I would at least like to get that cleaned up.

Again, the staff director says we don't know what we don't know. And that's one of the reasons why we're in the position that we're in today.

CHAIRMAN REYNOLDS: Okay. Someone

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refresh my memory. Where are we in the process?

VICE CHAIRMAN THERNSTROM: This needs a motion.

STAFF DIRECTOR MARCUS: Need a motion and a second.

COMMISSIONER KIRSANOW: I move that we adopt this motion as I read into the record.

CHAIRMAN REYNOLDS: Is there a second?

COMMISSIONER BRACERAS: Second.

CHAIRMAN REYNOLDS: Discussion?
Commissioner Yaki?

COMMISSIONER YAKI: I'm going to oppose the motion. I understand the spirit in which it was made by Commissioner Kirsanow, but I have seen when IGs come into an agency: one, they're not cheap; and, two, they tend to turn things upside down.

And I think that this goes to my concern about how in some ways we need to move on, get on with the future, rather than keep on going into the past and allocating scarce staff resources to comply with an IG time, money, resources.

I think it would be nice to know. I don't know if we need an IG to do it. And I just will oppose.

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CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: When this motion was originally circulated, I had some concerns because it seemed to be proposing that we create a new position or have someone detailed over here indefinitely to look at everything.

I do think that this revised motion addresses those concerns in that it seems to ask the IG to look at discrete issues and it seems to limit the role and the duration of the Inspector General's work here to these particular things. And when the work is done, that will be the end of his services, his or her services.

So I do think, Pete, that you have addressed those concerns. I wasn't clear on the legal questions that I had raised in the e-mail traffic, how that is resolved here.

I think I can support this motion, but I just wanted some clarification.

COMMISSIONER KIRSANOW: At least based on preliminary research that I have done and discussions or at least looking at what the staff director had, my understanding is that this is something that is

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done on if not a regular basis, it's not uncommon, that there are authority under the Economy Act, that the General Services Administration typically does things like this for an agency like this. So I think I have addressed those concerns. I don't have at this point any concerns with respect to the legality of it.

I think when we talk about emergency reforms and structural reforms, I think there is a cost savings involved in getting out front on an issue and addressing it. Sometimes there is some pain involved there, but I think we need to know where we stand right now, how we got into this fix.

And I understand Commissioner Yaki's point. I'd prefer to move on also. But we don't know where we have been. One of the reasons why we can't even discuss some of the things that we would like to do or how much we are in the hole is because we don't know where we have been.

I think we need to make a clean brush of it by first assessing where we have been, how we got into that position, to what extent we may be in the hole.

The staff director has worked

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prodigiously to get us out of this hole. It's unfair to him that we not assess exactly what happened before we got here.

CHAIRMAN REYNOLDS: Commissioner Taylor?

COMMISSIONER TAYLOR: I agree with the spirit of the motion. I have just a couple of questions. And I apologize in advance. This may be obvious to everyone else.

Someone just please explain to me. Are these issues that GAO can't address for us? And I'm thinking primarily of the fiscal issues that we all understand. Is there a reason they can't do it?

COMMISSIONER KIRSANOW: Yes. Well, I don't know that they can't but two issues with respect to that. GAO is something that is more periodic. I view this as something, a surgical strike to come in, address this discrete problem.

I don't know when GAO could get around to coming and doing something like this. I think this is something we have to do as quickly as possible.

I had another point, which conveniently I've forgotten, but I think that when you have got an individual charged with doing a discrete assessment

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like this, I have more confidence in someone who is charged with a finite function than somebody coming in and just kind of deciding, "Well, let's figure out what we're going to do," making it part of a package of reforms.

COMMISSIONER BRACERAS: If I could answer?

CHAIRMAN REYNOLDS: Commissioner Meeks?

COMMISSIONER MEEKS: And I have a similar question. I mean, why would the IG be able to do something that this audit firm could not?

COMMISSIONER BRACERAS: Can I?

COMMISSIONER KIRSANOW: I'll defer to Commissioner Braceras.

COMMISSIONER BRACERAS: I think one way, just to speak to the concerns raised by Commissioners Taylor and Meeks, I think one way that this differs from what GAO does is that this particular motion asks for an opinion on whether any laws were violated.

COMMISSIONER MEEKS: But the audit will do that, too, the financial.

COMMISSIONER BRACERAS: The financial audit also does that?

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VICE CHAIRMAN THERNSTROM: Yes.

COMMISSIONER BRACERAS: Because GAO does not do that. And that was when --

COMMISSIONER MEEKS: An audit does.

COMMISSIONER BRACERAS: Right.

COMMISSIONER MEEKS: And audit looks for ways to --

COMMISSIONER KIRSANOW: The second point now I remember was timing. I think that if the audit is something that is going to be done and I don't believe that they're going to get a report back to us anytime in the near future of the limited audit that was begun in November, was supposed to last for about three weeks. Is that correct?

STAFF DIRECTOR MARCUS: Logistics was supposed to be for a few weeks.

COMMISSIONER KIRSANOW: Right. And it lasted and has lasted for several months. That's a limited audit. This scope audit I believe will take much longer.

I think an Inspector General can come here -- again, I don't know this, but I believe that he can come in, surgical strike, get this assessed, give us an opinion or recommendations, and then we

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can move forward.

I don't know that we have got enough time to wait for an audit to include -- I think we need to get these questions addressed as quickly as possible.

COMMISSIONER TAYLOR: One follow-up question, if I may.

CHAIRMAN REYNOLDS: Yes?

COMMISSIONER TAYLOR: To be clear, I am in favor of the essence of this motion. My only concern is, quite frankly, fiscal. I just want to make sure we have considered all of our options and to make sure that to the extent that we need the expertise and someone is not in a position because of the lack of the expertise or because of the timing, which I also think is important, simply can't be done.

My concerns are addressed, in large part, by the qualifying phrase "as soon as is practicable."

If that were not in there, it was something that I would suggest we place in there. And I don't necessarily think that this is inconsistent with the concerns raised by Commissioner Yaki because I think it is something we need to do in order to effectively move forward, which we don't repeat the mistakes of

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the past, but my concern is fiscal in nature only and that we consider all of the options and that we're smart as we go about it.

VICE CHAIRMAN THERNSTROM: Well, the questions that Commissioner Yaki raised I also had in mind. And I would like to ask the staff director to answer the basic question of whether he thinks an Inspector General is essential to identifying precisely the matters that Commissioner Kirsanow, which are obviously important, has identified in one, two, and three.

STAFF DIRECTOR MARCUS: Vice Chairman Thernstrom, I do not know at this point whether it is essential. I had previously identified these issues as being potential issues for an Inspector General to look at.

And I have asked for research, which is ongoing, to determine such issues as whether this conduct, if true, would be unlawful before determining for sure whether we would retain an IG. If it turns out that such an audit, even if true, would not be unlawful, then my inclination is that it's not essential.

Then the other question I have is whether

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this would be within a full scope audit, which we're still not sure of and would require conversations with an auditor. And if either it would be encompassed by an audit or, alternatively, if an auditor would identify this issue or do some of the groundwork, whether we should do that first.

So I would say at this point I cannot say that it is essential. There are still some questions that we have been looking at.

VICE CHAIRMAN THERNSTROM: Well, I mean, in lieu of that, in light of that answer and in light of the two points that I think are correct that Commissioner Yaki that, one, IGs are not cheap; and, two, they tend to turn agencies down, I wonder if we shouldn't postpone a decision on the IG until we have more information about what an audit would accomplish.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Mr. Chair, without belaboring the point, first of all, I don't believe the Inspector General is going to turn this place upside down because it's for an extremely narrow scope.

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Second, I think that if we retain an IG, I think the staff director indicated he was uncertain as to whether or not it's essential if, in fact, there is no legality. Can the GAO do this?

Well, that is one of the questions we don't know. We don't know what we don't know. It's one of the things I think an IG is perfectly suited to address.

I am sensitive to the concern that maybe we're duplicating efforts. Could a full scope audit address the same thing? I think it goes to the previous point. There is a timing imperative here, and I think that that needs to be addressed.

I would like to say once again I think that this is a reform, but I think it goes into the rubric of one of those emergency reforms. I have absolutely no doubt based on the three reports that we have gotten from the staff director that we're in extraordinarily bad shape. And I think we have extraordinary measures to dig us out of it.

I don't believe this is extraordinary. I think this is one of the minimal steps necessary to get this agency back on the road toward the fiscal and operational integrity which we hope it would

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have.

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I'm going to support this motion. I do think it's discrete enough that the concerns raised aren't particularly concerning to me.

I guess the one thing is I'm not an accountant. I'm a lawyer. I don't understand with the specificity that some others do how these audits work.

I personally have never heard of a financial audit reaching a legal conclusion or making a legal recommendation. If I'm wrong on that --

COMMISSIONER MEEKS: You're wrong. You're wrong.

COMMISSIONER BRACERAS: Okay. So they typically make legal recommendations?

COMMISSIONER MEEKS: Absolutely. If they find illegal use of funds, it's part of an audit.

COMMISSIONER BRACERAS: Okay. Because the one concern I'm left with is the duplicative nature of it, but other than that, on the merits, it seems perfectly reasonable to me to look at these

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questions.

CHAIRMAN REYNOLDS: Well, we have some additional information. Ken has some information regarding his efforts to get an IG to look into this.

STAFF DIRECTOR MARCUS: I've had preliminary discussions with an IG's office about whether this specific topic would be doable, whether it's the sort of thing that they could take, whether it's the sort of thing that they would be inclined to take on if asked.

I have not gotten a final or definitive answer, but the preliminary responses that I got was that this does look like the sort of thing that an IG could do upon our request if we pay for it.

COMMISSIONER KIRSANOW: Yes. I think you had expressed that to me before. That's one of the reasons why I tailored it in this fashion.

CHAIRMAN REYNOLDS: And I'd also like to add that it's normal. When these types of issues come up, it's normal that the IG conducts the investigation.

I don't know whether these allegations are tantamount to illegality, but if it goes down that road, typically it's the IG that investigates.

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And at the end of that investigation, there may or may not be a referral to the Justice Department. That's just been my personal experience working in the government.

Commissioner Yaki?

COMMISSIONER YAKI: Yes. Just a final comment. I just want to follow up on what the chair just said. This is not an inconsequential action because the IG when they come in is not restricted by what we ask them to do but, really, by what they believe their duty is to enforce the laws of the United States.

I have seen them go into agencies. It is not a pretty sight. It takes a lot of time. It will cost a lot of money. I understand the sentiment behind Mr. Kirsanow's thing, but the concerns operationally to this agency at this time still compel me to pose it at this time. And I call the question.

CHAIRMAN REYNOLDS: Any other questions or concerns before we vote?

COMMISSIONER BRACERAS: Well, I just have a question. What is the advantage of doing basically the same thing through an auditor versus an IG? What

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are the advantages and disadvantages of having one do it versus the other if what you're saying is they do the same thing?

COMMISSIONER MEEKS: Not being an absolute expert on this, an audit would systematically go through and give you balances so that you know where you are starting.

COMMISSIONER BRACERAS: Okay.

COMMISSIONER MEEKS: They would also identify issues that we all even raised. I mean, if we gave a mandate to the auditor to do what you're suggesting the IG do, I mean, an auditor would do that, too.

But they go and they make sure that things are balanced. And so it's a more comprehensive -- I'm not convinced an IG can surgically cut to the chase on this because they also have to systematically cut through things to come up with anything that is definitive.

CHAIRMAN REYNOLDS: Commissioner Kirsanow?

COMMISSIONER KIRSANOW: Chair, I think I have made my case a number of times with respect to all of these issues. In the interest of collegiality

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and seeing if we can move forward, though, I would for the moment move to table this pursuant to what Commissioner Thernstrom said until next month's meeting. We can look at this issue a little bit more.

And I would propose a substitute motion.

And I would explain it. This doesn't necessarily require us to do anything at this point but goes to I think and incorporates the concerns that I have heard around the table.

I'll wait until everybody has a copy of it, but this is similar to the motion that was originally sent around last week, but it has a contingency attached to it.

This is governance and accountability again. The staff director and Office of General Counsel shall investigate the cost and legal requirements relating to retaining an Inspector General, either as an independent contractor, employee, or detailed from another agency to do the things I mentioned before.

This is more expansive, but this is to get an understanding as to what the consequences are: one, identify any instance of fraud, waste, abuse,

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or mismanagement of tax dollars by the Commission; two, evaluate the efficiency of the Commission, eliminate effectiveness of the Commission also pursuant to an objection by Commissioner Braceras; three, report findings and recommendations to the Commission on a regularized schedule to be determined by such general in conjunction with the chairman and staff director and the staff director and Office of General Counsel report its findings to the Commission by no later than its April 2005 meeting.

In other words, let's get more information. And then if it's the sentiment of the Commission that, in fact, an Inspector General is warranted in the limited scope that was contained in the second motion that I proffered, then we can have a vote on it.

CHAIRMAN REYNOLDS: Is there a second?

VICE CHAIRMAN THERNSTROM: I second it.

CHAIRMAN REYNOLDS: Okay. Vice Chair Thernstrom?

VICE CHAIRMAN THERNSTROM: I very much appreciate the revision of this motion. And I think it makes a very important point that has been lost in some recent press on the Commission. It underscores

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the commitment to collegiality on the part of all commissioners sitting, the commitment to collegiality without compromising its commitment to reform. And I'm very pleased by this process and thank Commissioner Kirsanow for this revision.

CHAIRMAN REYNOLDS: Commissioner Meeks?

COMMISSIONER MEEKS: Well, in the spirit of fiscal responsibility, I would actually ask, then, that there be an amendment to this that examines the scope of an audit, the time period, and the cost so that there can be a comparison and so that it's not duplicative. I mean, I would offer that amendment.

VICE CHAIRMAN THERNSTROM: Say it exactly again. How do you want to change the wording?

COMMISSIONER MEEKS: Let's see. "Staff director and Office of General Counsel shall investigate the cost and legal requirements related to retaining an Inspector General, either as an independent contractor, employee, or detailed from another agency."

I would also like to say, amend it to say, somehow that within this amendment or within this motion that there be investigation of what an auditing firm's cost, scope of work, and time frame

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would be so that there could be a comparison.

COMMISSIONER YAKI: To accomplish the same task.

COMMISSIONER MEEKS: To accomplish the same task, yes.

COMMISSIONER BRACERAS: That would be helpful.

CHAIRMAN REYNOLDS: I guess my concern is it's not clear to me that the Inspector General and the accounting firm that we would eventually retain to conduct an audit, that they're going to be doing the same thing. There may be some overlap. There may be some overlap.

COMMISSIONER BRACERAS: Well, that's the question.

VICE CHAIRMAN THERNSTROM: But that's the question.

COMMISSIONER TAYLOR: That should be I think incorporated into what we hear in our April report from the staff director.

COMMISSIONER MEEKS: The Inspector General may not be doing as wide a scope as the auditing firm, but the auditing firm may be doing that same scope as the Inspector General.

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And given that we're going to be paying a lot of money for an IG as well as an auditing firm, which we have already passed that motion for, I think it's worth exploring the cost and the scope of work.

And if time is the issue, I mean, I think that is a question for the IG also. You know, what is the time frame around this?

And if it clearly shows that an IG can better with less cost --

CHAIRMAN REYNOLDS: Pete, it's a friendly amendment.

COMMISSIONER KIRSANOW: Look, I think we need as much information as possible. I'm not looking to duplicate efforts, but, as I said, I think I made my points, which I'll stand by, in terms of it will be reflected on the transcript as to what we will be doing if, in fact, the report comes back with respect to cost, with respect to legal requirements.

I think it's going to be narrow in scope. I'm satisfied that we can do that.

I still think that Inspector General is -- based on everything that I have read and have been led to believe -- an imperative. I would think that in April, we are going to be looking at the real

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prospect of retaining an Inspector General.

If, in fact, the staff director concludes or reports back to us that the audit will accomplish the same objective, will do so in a cost-effective fashion, and do so expeditiously, I trust us here to do the right thing.

CHAIRMAN REYNOLDS: Do you accept the friendly amendment?

COMMISSIONER KIRSANOW: Absolutely.

CHAIRMAN REYNOLDS: Okay. Commissioner Braceras?

COMMISSIONER BRACERAS: Yes. I'd just like to say that I think that all of us here are committed to finding out the answers to the questions posed by Commissioner Kirsanow in his first motion, you know, questions one, two, and three, whether the Commission unlawfully deferred any payments that properly should have been paid in fiscal year 2004 to fiscal year 2005 in violation of the Anti-Deficiency Act, et cetera, et cetera. I think we're all committed to having those questions answered.

The only question here is the best way to do so, whether it makes sense to do it through an auditor, through an Inspector General, or to retain

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both and have them have different mandates, separate mandates.

So I just want to be clear that, at least from my perspective, we're all committed to getting to the bottom of these questions. We're just grappling with the most economical and efficient way to get to the bottom of these questions.

I don't want there to be any impression left that by deferring this to April, that somehow we are not interested in getting to the bottom of this. We are.

CHAIRMAN REYNOLDS: Yes?

VICE CHAIRMAN THERNSTROM: And that was my point by saying, look, this whole process underscores the commitment of the collegiality on the part of commissioners without compromising the Commission's dedication to reform, absolutely.

CHAIRMAN REYNOLDS: The staff director has comments.

STAFF DIRECTOR MARCUS: If I may, staff have just reminded me that between now and our April meeting, we have three weeks, rather than the usual four, and that much of that time will be devoted to handling the emergency issues that I have discussed

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earlier. So I would just ask that commissioners keep in mind that between now and then, most of the time will be focused on that.

COMMISSIONER KIRSANOW: Ken, I appreciate you've got subpoenas to answer and you've got all kinds of things going. You're putting out fires everywhere.

Everyone around here has made their point. It's on the record. This is a new day. It's not 2004. We're not going to hang you out to dry if we don't feel like you come up with some super-duper report.

But I would also say at the same time that this is an imperative. Everything that the staff director has reported to us has indicated that we had better get our act together very quickly. We only have a small window of opportunity.

We have got to get our act together for other reasons, if for no other reason than to satisfy Commissioner Yaki's concern that we still be able to discharge our statutory imperatives and that we make sure that we do the best we can to limit any draconian cuts or changes to the Commission. And I think this is the best way of doing it.

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If we get ahead of the curve, we can limit the damage financially, operationally, and still possibly do our best to discharge our statutory mission.

COMMISSIONER YAKI: Move as amended.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRMAN THERNSTROM: I second to move as amended.

CHAIRMAN REYNOLDS: Let's vote. All in favor?

(Whereupon, there was a chorus of "ayes.")

CHAIRMAN REYNOLDS: Any in opposition?

(No response.)

CHAIRMAN REYNOLDS: The motion passes as amended.

Yes, Commissioner Kirsanow?

COMMISSIONER KIRSANOW: I've got one last thing. And this is not a motion, but Commissioner Braceras' working group on reform is entertaining a variety of issues with respect to projects. I have something that I would just like them to consider when considering the manner in which projects are planned.

I'm not going to address this. This has

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to do with something we discussed in the past.

COMMISSIONER BRACERAS: Yes. Can I just speak to this briefly?

CHAIRMAN REYNOLDS: Yes.

COMMISSIONER BRACERAS: I believe this is at least drawn from proposals that Commissioner Redenbaugh put forward last year.

COMMISSIONER KIRSANOW: Right.

COMMISSIONER BRACERAS: And we did discuss that at our last meeting that we wanted to see those again and that we wanted to work from that template. So thank you very much.

CHAIRMAN REYNOLDS: Okay. Let's see what's next. Adarand.

VICE CHAIRMAN THERNSTROM: I was going to say take a five-minute break. Okay.

CHAIRMAN REYNOLDS: Okay. Let's take a five-minute break.

(Whereupon, the foregoing matter went off the record at 11:51 a.m. and went back on the record at 12:11 p.m.)

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CHAIRMAN REYNOLDS: Let's wrap this up. We have, actually, two issues left. Now, what's

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■ scheduled, the Adarand proposal, we're scheduled to
■ discuss that, but Commissioner Taylor has an idea he
■ would like to discuss. Commissioner Taylor?

■ COMMISSIONER TAYLOR: It's an idea that I
■ just want to put on the table for discussion. If
■ it's not feasible or practical, for whatever reason,
■ that's fine. But if I were in a situation where I
■ were representing a client that had entered into an
■ agreement to make a payment -- and I'm referring
■ specifically to the EEOC settlement that I understand
■ we'll be making a payment on in this fiscal year of
■ some \$188,000. Is that not true?

■ STAFF DIRECTOR MARCUS: I've avoided
■ characterizing the payment as being either one or
■ more than one and avoided characterizing it as either
■ a settlement or a claim that has been fully resolved
■ because of concerns that the more specific one gets
■ about it, the closer one gets to a confidentiality
■ agreement, which is not anything which we've entered
■ into.

■ COMMISSIONER TAYLOR: Okay.

■ STAFF DIRECTOR MARCUS: What I can say is
■ we have an obligation this year in the amount of
■ \$188,000 based on EEO matters from the past.

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COMMISSIONER TAYLOR: Putting my private hat on for a moment, if I were in a situation where I represent a company that had an obligation of that amount but also had some serious financial concerns, it would not be inappropriate for me to go back to plaintiff's counsel and seek some type of accommodation.

The accommodation would not be substantial. It would require a delay perhaps of the obligation. And we could put some other issues on the table.

But that would I think put us in a much stronger position in the short term if we could reach an accommodation with plaintiff's counsel, if that's possible.

VICE CHAIRMAN THERNSTROM: This accommodation would involve simply timing.

COMMISSIONER TAYLOR: Timing is all it would involve.

STAFF DIRECTOR MARCUS: May I interpret that, Commissioner Taylor, as a request for legal analysis between now and the next meeting as to whether that is something that could be --

COMMISSIONER TAYLOR: It's feasible,

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correct. Yes. I just want to determine whether it's feasible, not knowing the details of the arrangement.

STAFF DIRECTOR MARCUS: We'll look into whether it's feasible and what can be --

COMMISSIONER TAYLOR: Even if it's a partial relief, that would certainly I think put us in a different position in the short term.

COMMISSIONER KIRSANOW: Was this an EEOC or was this the private attorney?

STAFF DIRECTOR MARCUS: We have incurred over \$300,000 in EEO settlements and adjudications over the last 5 years or so, of which \$188,000 is due this year.

I think I can answer any questions about this if this were in closed session. As for what I can say in open, we're somewhat limited because as a small agency, we have had only a small number of them. And I don't want to say something that could make everyone aware of which one I'm talking about.

COMMISSIONER KIRSANOW: Yes. I would say that I'm sensitive to the spirit of Commissioner Taylor's comment is understood by all. We're in dire straits.

I would also say, though, there is a

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competing interest. That competing interest is that this is the U.S. Commission on Civil Rights. It's an embarrassment that we have EEO judgments against us.

If I had the money and it were up to me, if I had control of the congressional appropriations, I'd make sure that that's the first thing that the U.S. Commission on Civil Rights discharges.

That being said --

CHAIRMAN REYNOLDS: Okay. So it is my understanding that --

STAFF DIRECTOR MARCUS: May I just briefly respond to Commissioner Kirsanow? We have taken measures just in the last three months to try and correct any problems we have in that area.

Of course, I have issued to all staff a restatement of the agency's commitment to protecting the equal employment opportunity rights of all employees.

In addition, we have also instituted the practices that would protect the integrity of the EEO practice. For instance, we have ensured that there will be a firewall between different parts of the agency that are involved with different aspects of the EEO process that hadn't been there before and

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also have ensured that the director of EEO reports directly on EEO matters to the staff director as required by EEO practices.

Both of these are matters that the EEOC has urged on all agencies but which we had not previously been doing. But it is certainly for the civil rights agency a priority to make sure that we are putting that in order. And that is something that we have proactively done.

COMMISSIONER KIRSANOW: And I commend the staff director for doing just that.

CHAIRMAN REYNOLDS: Okay. On to our end. Pete, would you like to --

COMMISSIONER KIRSANOW: I don't have the motion. I'm sorry. Actually, why don't you move this?

COMMISSIONER BRACERAS: Okay. I move that the OCRE project assessing the federal government's role in implementing the Supreme Court decision in *Adarand v. Peña* focus on government compliance with the court's holding that when any racial classification is imposed by a government actor, the classification must serve a compelling governmental interest and be narrowly tailored to

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further that interest.

Specifically, I move that OCRE evaluate governmental compliance with the requirement that agencies consider race-neutral alternatives in contracting under the Small Business Administration programs.

CHAIRMAN REYNOLDS: Is there a second?

(No response.)

CHAIRMAN REYNOLDS: No second?

COMMISSIONER TAYLOR: I'll second it.

CHAIRMAN REYNOLDS: Okay. Thank you.

Discussion? Yes, Commissioner Yaki?

COMMISSIONER YAKI: I have first a point of information. This is a motion to change the concept and scope of the previously approved project.

COMMISSIONER BRACERAS: Expand the focus of it.

COMMISSIONER YAKI: Expands it.

COMMISSIONER BRACERAS: I would say yes.

COMMISSIONER YAKI: Expands it. If I may be so dense, what is the previously approved project?

COMMISSIONER BRACERAS: Yes. We --

VICE CHAIRMAN THERNSTROM: We all need a copy of that.

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COMMISSIONER BRACERAS: Is it in the materials?

CHAIRMAN REYNOLDS: Now, we're talking about the original motions? This proposal was established prior to December?

COMMISSIONER YAKI: Yes.

CHAIRMAN REYNOLDS: And so I don't have any personal knowledge.

COMMISSIONER MEEKS: I have it.

COMMISSIONER BRACERAS: Share.

CHAIRMAN REYNOLDS: Okay.

COMMISSIONER MEEKS: I guess I have to say that I think -- I mean, maybe I'm misunderstanding that this is an expansion because it looks to me like it's a change and a narrowing. I'm not sure.

VICE CHAIRMAN THERNSTROM: I'm sorry. I need the text of the original.

COMMISSIONER MEEKS: Okay.

VICE CHAIRMAN THERNSTROM: Do you have it, Elsie, that we could photocopy it quickly?

COMMISSIONER YAKI: Just for clarification, Mr. Chair, point of information. This is a project proposal that had been previously

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approved, I believe, in 2004, before you came along, Mr. Marcus, and before you came along, Mr. Reynolds

CHAIRMAN REYNOLDS: That's correct.

STAFF DIRECTOR MARCUS: Commissioner Yaki, if I may, I believe it was approved during the planning session in 2003. That would have been in early 2003.

COMMISSIONER YAKI: The reason I am asking is that I got confused by what was in our project planning materials in February that talked about Adarand in the context of disparity studies. And then this was attached, this motion was attached, on top of that, when we received it in the binders.

Is the disparity study issue completely separate and apart from the Adarand study, what we're doing for September 30th?

STAFF DIRECTOR MARCUS: Yes, Commissioner Yaki. There are two different proposals. There's the Adarand proposal. And then there's a separate additional proposal on disparity studies. There are different potential projects.

COMMISSIONER YAKI: Okay. Well, one already has been approved. That would have been the original Adarand study.

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STAFF DIRECTOR MARCUS: That's correct.

COMMISSIONER YAKI: Okay. And so what appeared in the February binder is in addition to, not a substitute for, the ongoing Adarand study?

STAFF DIRECTOR MARCUS: I would view that as well. Yes, that's correct.

COMMISSIONER YAKI: And so the motion only applies to the previously approved Adarand project of 2003?

STAFF DIRECTOR MARCUS: That's how I interpret the motion as well.

VICE CHAIRMAN THERNSTROM: Yes. Elsie, why don't you read the text here?

COMMISSIONER BRACERAS: This is the original?

VICE CHAIRMAN THERNSTROM: Yes. This is the scope of the original.

COMMISSIONER MEEKS: Okay. The year 2005 will mark the tenth anniversary of the Adarand decision and, as such, offers an opportunity to review the decision's effect on contracting levels of women and minority-owned firms.

Through literature reviews, data analysis, and interviews, the Commission will analyze

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Adarand's effect based on the number of minority and women-owned firms that have received federal contracts to analyze the amount of federal procurement funds awarded to these businesses; examine whether the SBD certification process has reached the levels initially projected and whether, in turn, certified businesses have benefitted by securing federal contracts; examine the role of federal agencies, including SBA, the Department of Commerce, and the Department of Justice in implementing procurement programs for women and minority-owned businesses; and examine why the goal of awarding five percent of federal contracts to women-owned businesses has not been reached and measure the extent to which the contract assistance for women-owned business programs is making strides in that direction.

COMMISSIONER YAKI: Just a point of clarification again. The amendment that I made that is contained in the agenda for this term, it's motion number three under tab five, the Yaki-Meeks motions.

Number three basically is a restatement of the original Adarand study.

The reason for my confusion -- and this

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is I think a very sensitive and interesting subject -- is that I received a copy last night -- actually, no; I'm sorry -- this morning of a project concept for an Adarand study that was sent to different departments of the federal government that came from the Commission that is different from what Ms. Meeks just read, is different from what Commissioner Braceras read, and different from what I had amended and different from the disparity study in the February 18th proposal. And I'm just trying to figure out how --

VICE CHAIRMAN THERNSTROM: Do you know the date of that?

COMMISSIONER YAKI: I think it was February 8th. It's entitled "U.S. Commission on Civil Rights Race-Neutral Federal Contracting Project Concept." And it is --

COMMISSIONER BRACERAS: It was sent from whom to who?

COMMISSIONER YAKI: It was sent out to different departments of the federal government. It contains within it interrogatories and document requests. The deadline was February 28th of this year.

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COMMISSIONER BRACERAS: Okay.

COMMISSIONER YAKI: But the wording of this is distinctly different than that which Commissioner Meeks read. And I'm just wondering had there been a change approved by this Commission in the interim that I am unaware of between -- because I thought that -- I did not see anything in the records of January, December concerning February.

COMMISSIONER BRACERAS: So why don't we let the staff director bring us up to date on the project and its focus?

STAFF DIRECTOR MARCUS: There were a series of interrogatories that have been issued regarding the race-neutral alternatives issues with respect to Adarand. Those issues are in a sense encompassed within the previously approved proposal.

There was an early draft of the potential interrogatories that would go with the first proposal that dealt with a number of different issues along the lines that Commissioner Meeks just described. They were somewhat broad and covered a lot of areas but not in considerable depth.

We focused on the interrogatories that went out more recently on the race-neutral

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alternative issue, which originally could be construed as a part of the 2003 proposal but which is largely within the scope of the current proposal. The intention in issuing these interrogatories was to fall within the scope of the current motion.

COMMISSIONER YAKI: My concern is not so much with the interrogatories as the fact that there was an attached project concept that in my view had some deviation from what the Commission had previously approved.

I understand that the Commission has the authority and the obligation and the right to make those changes, as is evidenced by Commissioner Braceras' motion. My concern is that we somehow the Commission sent out -- and I think this went to many departments, not just one. Is that correct? It went to a number --

STAFF DIRECTOR MARCUS: To a number of agencies.

COMMISSIONER YAKI: -- a number of different agencies attaching --

STAFF DIRECTOR MARCUS: If I may, the interrogatories went to a number of different agencies.

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COMMISSIONER YAKI: Right.

STAFF DIRECTOR MARCUS: I can't say for certain whether the document you were referring to went to another agency.

COMMISSIONER YAKI: Well, it was attached to the cover letter to the agency. And, again, it's a project concept. You know, I understand that there are going to be disagreements in philosophy and characterizations as we go along. And I will always be sure to express mine, as I am sure you will be to express yours, in a collegial and decorous manner.

But my concern is that here this is a -- it seems to be a substantive redefinition of a previously approved project that went out to federal agencies where in some ways it's almost misleading.

I want to speak substantively on Commissioner Bracer's motion, but here we talk about although some of the text mitigates a little bit some of the title itself, it still doesn't go toward the actual goals, when I was looking at these, the actual goals that were stated in the original proposal.

For example, when I was going through looking in the interrogatories, there was no special mention of the women-owned business compliance

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efforts that was referenced in that. There are other issues involved as well.

I am just concerned that we've sent a lot of information out that may not: A) be as complete as it should have been for the original concept; and then, B) if we shift it to where this would be in addition to what you're talking about, that it may not be as -- we may have to send a whole other set to some of these agencies. I just want to make sure that we do it properly.

I guess I want to know where this came from, how it came about, and under what authority was given to change how the project was defined in the letters that went out to departments in early February of this year.

STAFF DIRECTOR MARCUS: I issued the interrogatories according to the process for issuance of interrogatories for the Commission and followed the form for insurance of interrogatories. So we're familiar with the way in which it was done. This is the way in which it was done.

The interrogatories were done in such a way that they would be consistent with the project as I best estimated it would be agreed to in the

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February meeting, at a time when it appeared that the Commission might look at this during the February meeting. But I also believe that the interrogatories would be pertinent to either the original 2003 proposal or the one which is on the table today.

COMMISSIONER BRACERAS: May I be heard?

CHAIRMAN REYNOLDS: Commissioner Braceras?

COMMISSIONER BRACERAS: I think what happened was that the motion to expand the focus of the project was supposed to come up in February and it was deferred and then the interrogatories went out.

And that is why I insisted that we still discuss this motion today, even though we were deferring other aspects of project planning. I think it was a mistake to defer this particular motion last time because I agree that if the Commission wants to expand or change the focus of a project, that has to be decided by all of us by a majority vote and that the staff cannot change the focus of a project or expand the focus of a project without our consent.

So I think it may have been a mistake and an oversight that certainly I had come to the

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February meeting expecting to vote on this -- or not come to but come to via telephone. But I had expected to vote on this, and then it was deferred. And I think the next thing we knew, there were interrogatories that were going out.

So that is why I wanted to make sure that we at least retroactively authorize the expansion of the project today. And I fully agree with Commissioner Yaki that that is not the best way to do business going forward. I want to see any changes come before us as a body before actions are taken in the future.

COMMISSIONER YAKI: Mr. Chair, I appreciate Commissioner Bracer's remarks. My concern I guess is that I have read with a lot of alarm how business was conducted in prior years. And I know that there is a lot of good faith and good will amongst my fellow commissioners to not repeat the mistakes of the past when it comes to process. So that's why I bring this up rather gently, rather than going screaming and foaming at the mouth.

My problem continues to be that this was at least the one letter I have is dated February 8th, which is ten days prior to our meeting on the 18th.

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And I understand that if the staff director believes that the interrogatories cover the original scope, then I would ask that he demonstrate that because I have some difficulty with it. But if he could show how --

CHAIRMAN REYNOLDS: I think it was clear

--

COMMISSIONER YAKI: If it was in pursuing the original project, I have no problem. But the fact that a different project's scope was attached with a different title, with a different emphasis concerns me because we had not as a Commission been allowed to make that change. And I have no doubt that the Commission would have made that change.

CHAIRMAN REYNOLDS: Commissioner Yaki, I think that it's clear that those interrogatories should not have gone out the door. They were sent. And this process, at least with respect to this particular project, has been tortured. There are a number of different types of Adarand proposals floating about. There's been the postponement of discussion.

A mistake was made. It shouldn't have happened. And I am sure that the staff director will

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take steps to ensure that going forth this particular type of mistake doesn't happen again.

VICE CHAIRMAN THERNSTROM: A question for the staff director. What is this February 8th memo that went out that doesn't seem to conform --

COMMISSIONER BRACERAS: Yes. I haven't seen it. I don't --

COMMISSIONER YAKI: I just got it. I would like to be able to redact to whom it was sent so no one gets in any trouble, quite frankly. And I will do that today, but it is dated February 8th, 2005 from this office. It is signed by the chair. It directs that any questions go to members of OCRE.

And then there were four pages of attachments. One was the project concept and three pages of interrogatories.

Again, because I don't want to get anybody in trouble -- I mean, this just sort of landed on my doorstep. And I'm not trying to cause it. I just want to make sure that this is something that -- I accept your word that it was an honest mistake.

I just would like to know that: one, the relationship between these interrogatories and the

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original Adarand proposal, I'd like to see where the correlation is; and then, you know, that's as far -- I just wanted to bring that up. That's as far as I want to go with that.

I'd rather talk about Commissioner Braceras' substitute at this point, but I think it is important in terms of how we move forward that I get some explanations about this.

COMMISSIONER BRACERAS: I agree with you 100 percent. Obviously I support the substance of the motion to expand the project, but certainly I never had the intent to begin to expand the project before this body had a chance to vote on that. And I didn't know that that was being done until I received copies of the interrogatories in the mail at the same time that everybody else did.

The larger point, however, is that this was an ongoing project. The interrogatories were an attempt to move forward in a way that the Commission was inevitably going to go. And, as a matter of process, though, you are 100 percent right in that that shouldn't happen again.

But with respect to the substance of the motion that I have just made, my intention would be

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for it to be an expansion of the work that is going on and the data that has previously been collected.

I think that one of the problems with our work product in the past has been a lack of balance.

And I think that the integrity of our work product has come into question because of the lack of balance.

I think that adding this additional element to the project will produce a more balanced report.

CHAIRMAN REYNOLDS: Commissioner Yaki?

COMMISSIONER YAKI: Then if the intent of Commissioner Braceras' motion is to add to and not subtract from the original Adarand report, I have less concern except for the word "focus."

COMMISSIONER BRACERAS: Yes, I agree with that change.

VICE CHAIRMAN THERNSTROM: It should be "look at."

COMMISSIONER YAKI: Or "examine."

COMMISSIONER BRACERAS: Yes.

VICE CHAIRMAN THERNSTROM: Or "examine."
Better.

COMMISSIONER BRACERAS: I accept that.

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COMMISSIONER YAKI: Okay.

COMMISSIONER BRACERAS: And I apologize for the imprecise wording.

VICE CHAIRMAN THERNSTROM: It's not imprecise. It's just misleading.

COMMISSIONER YAKI: And when you speak about the Small Business Administration programs, which ones are you referring to? Are you referring to the certification process for federal contracting? Are we talking about the 8(a) program?

I guess I just want to make sure that staff has some specificity because there are two different creatures in terms of what the standards are.

COMMISSIONER BRACERAS: Well, what are your thoughts on --

COMMISSIONER YAKI: I don't know because I am not the world's greatest Adarand expert, but I do know that if we're looking at the 8(a) programs, I think -- I don't even know if 8(a), if that would even -- yes.

It sort of starts there but not really because the SBA, SDB does the certification for the entire government contracting program, which I think

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is what you are talking about.

COMMISSIONER BRACERAS: What would be your preference?

COMMISSIONER YAKI: I don't know. I just want to make sure that -- I mean, substantively with your motion I have a concern, but I think it is less of a concern because the intent of the examination, I understand what you're trying to do.

But I would just say that for purposes of the record that Commissioner Braceras is absolutely correct that the Supreme Court decision in Adarand talked about the classification serving compelling government interests be narrowly tailored to further that interest and that there is a requirement that agency consider race-neutral alternatives in contracting.

But there is a second part, which I don't think needs to be stated in the motion but just for clarification that under Adarand, which has been upheld by the Eighth and the Tenth Circuits, that agencies are still able to use race-conscious remedies in certain circumstances.

But I understand what you are trying to do with this. And, as amended, I would have no

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objection to it being appended to the original Adarand proposal that was read by Commissioner Meeks.

COMMISSIONER BRACERAS: That is the intention. We just changed the word "focus" to "examine."

VICE CHAIRMAN THERNSTROM: To "examine."

COMMISSIONER BRACERAS: That's the --

CHAIRMAN REYNOLDS: Okay. We have a problem. We have a date by which we have to submit our statutory project. And the staff director just indicated that certain changes are likely to cause us to miss that deadline. Ken, would you like to elaborate?

STAFF DIRECTOR MARCUS: After discussion with staff, it was their impression that in order to be able to meet our statutory enforcement deadline, interrogatories would have to go out by approximately the time that the February interrogatories went out.

If additional document requests or interrogatories of any sort go out, even today, it has certainly been staff's impression that it would be unlikely that the results could be integrated into a project that could be completed within this fiscal year.

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COMMISSIONER BRACERAS: I'm confused because I thought that work had commenced several months ago and that data had been collected already on the first part of the project that Commissioner Meeks read into the record.

STAFF DIRECTOR MARCUS: No.

VICE CHAIRMAN THERNSTROM: Well, I'm further confused, Ken, additionally confused. I thought that the most recent interrogatories that went out were tied to what would be an expansion of the program that we would be voting on today.

STAFF DIRECTOR MARCUS: The interrogatories that went out in February were based on our best expectation of what the Commission would be able to approve.

Under the time constraints that if interrogatories were not to go out by early February, it was extremely unlikely that we would be able to complete the project within the period.

We have a few different practical challenges in terms of completing projects within --

COMMISSIONER BRACERAS: I'm sorry. I appreciate the time constraints, but my question is what work had been prior to them.

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VICE CHAIRMAN THERNSTROM: And haven't all necessary interrogatories already gone out if, in fact, we vote on this expansion of the project?

STAFF DIRECTOR MARCUS: No. Only one set of interrogatories has gone out, although it went out to multiple recipients. It went out in early February, and it was directed to the sorts of issues that are addressed in the motion that has been made today regarding narrow tailoring and race-neutral alternatives. That is the interrogatory that has gone out.

CHAIRMAN REYNOLDS: Staff Director, are you saying that we may not have enough time to complete the report that was originally proposed?

STAFF DIRECTOR MARCUS: Within this fiscal year. We could do the original project as a non-statutory report. We could do the original report for next fiscal year. We could do it in a way that combined this fiscal year and next fiscal year.

CHAIRMAN REYNOLDS: If we were to do that, do we have another report that we can offer up as our statutory report?

STAFF DIRECTOR MARCUS: I don't believe so. The bind we have been in since the new members

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came on board and since I came on board is that there was an older project that was underway, which appeared to be less likely to be what would be approved.

There is a different concept here that relates to narrow --

COMMISSIONER BRACERAS: But that's my question. If it was underway, that presumes that work had been done. I had been led to believe that data had been collected, that the idea that it was underway meant that data had been collected and that this was an expansion of the project that would attempt to balance it out and would attempt to make it more palatable to a bipartisan commission.

STAFF DIRECTOR MARCUS: Analysis had been done but not data formally collected.

COMMISSIONER BRACERAS: Okay. Because my interest is in seeing a balanced report and seeing a report that a bipartisan commission can support, not in putting forward a report that looks at issues that are only of interest to one side or the other.

COMMISSIONER YAKI: Let me interject. I fully appreciate and understand what Commissioner Braceras has just said. My concern goes, again, to

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process.

What has alarmed me in some of the statements that I have heard, not from you, Commissioner Braceras, in the past few minutes is that the interrogatories were promulgated under the theory that this motion was going to pass and it was sent prior to that passage by at least a full ten days. That's a problem that I have.

The second problem that I have is that if -- and I was not on the Commission at the time. I understand that there were some interesting difficulties when you first met in December and January just sort of getting accustomed to new faces and everything like that.

But knowing that this project was on the F.Y. 2005 calendar for September 30th, it appears that there was a holdback on -- excuse me for using that phrase but that somehow work either had not been done or has been done or perhaps has not.

I just need to know. Was there any work done at all prior to this?

STAFF DIRECTOR MARCUS: Yes.

COMMISSIONER YAKI: Because, again, I understand what Commissioner Braceras says. She

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wants to make sure that the report has the ability to have a balance to it. And her objection is that the prior approved report may not have reflected any balance.

I would be willing to support her efforts to do that if the other part of the study were also being done, but what I heard -- and this is what is disturbing -- is that there was no such intent to do the other part of the study. And it was simply to fulfill the intent of the motion that was going to be brought by Commissioner Braceras ten days after the interrogatories were actually sent out in relationship to that proposal.

That I have more than a little concern about because I have been and will continue to work in good faith with the Commission on process. I understand that the numbers have changed, the reality of who is in charge has changed. I understand all of that.

All I want to make sure is that as we go forward, it is my intent to be respectful, fair, and process-oriented, and not to engage in the vitriol of the past.

I am a little perturbed about the fact

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that Commissioner Braceras and I had a nice colloquy about the fact that this would be in addition to the report, it would provide balance to the report from her perspective. That's fine with me. But now I discover that, despite our colloquy, we hear that there won't be anything on the other section of the report. That disturbs me greatly.

CHAIRMAN REYNOLDS: Commissioner Yaki, we had a problem. Yes, the mistake was made. But what we do now is if we cannot do the Adarand project as amended, then we're going to have to find another project to do for '05 to satisfy our statutory obligation.

COMMISSIONER BRACERAS: May I ask a question about how much longer it would take because I do believe in the past with the environmental justice report, maybe you remember, Commissioner Meeks, we were about a month or two late with that project. And that seemed to be okay.

VICE CHAIRMAN THERNSTROM: That's correct.

COMMISSIONER BRACERAS: And so if it's only a matter of a few more months, maybe we can do that.

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CHAIRMAN REYNOLDS: Okay.

COMMISSIONER BRACERAS: I don't know.

STAFF DIRECTOR MARCUS: Staff are indicating that that may not have been a statutory report.

COMMISSIONER BRACERAS: It was not a statutory report?

STAFF DIRECTOR MARCUS: Not a statutory report.

CHAIRMAN REYNOLDS: Commissioner Meeks?

COMMISSIONER MEEKS: I would just like to echo what Michael has said. I, for one, having been part of the old regime, actually very much appreciate the sort of openness that you all have brought, then to find that these interrogatories really do not reflect what was approved that I read earlier.

And given that there has already been work done on this, I am very willing to vote on that expansion. I mean, that is going to be additional information we have to gather when the work already has been done on the one that has already been approved or at least some of the work.

So I don't know how much more time that this expansion will take, but I am willing to vote on

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that and --

CHAIRMAN REYNOLDS: Well, for me, can we expand the project and complete the project during this fiscal year? Can we meet our deadline? If the answer is no, it seems to me that we have to find a project that we can start and complete before the deadline.

COMMISSIONER BRACERAS: I need some more information on why the answer seems to be no.

VICE CHAIRMAN THERNSTROM: No. Wait a minute. I need an answer to the question of, well, is there a problem simply in completing the project if we expanded or is there a problem in completing the project, period?

COMMISSIONER BRACERAS: Right. Good question.

STAFF DIRECTOR MARCUS: Let me, if I may, speak generally to that. And then I may need additional more detailed information on that from our director of civil rights evaluation.

My understanding was at the time that we arrived in December-January, that we would have difficulty completing, really, any project other than exactly what had been approved before. That's how

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tight the timetable was.

Even back in early February, trying to either expand or alter the project would create timetable difficulties. We're now certainly after that. And so it's even more difficult in terms of the work flow and the amount of time required to get data.

But I'm certainly not the expert on what is required in order to get the statutory report out.

So if the commissioners are interested in hearing more, --

COMMISSIONER BRACERAS: Yes.

VICE CHAIRMAN THERNSTROM: Yes.

STAFF DIRECTOR MARCUS: -- that's an OCRE issue. And I would defer to --

CHAIRMAN REYNOLDS: Ms. Dickerson, we need your help.

VICE CHAIRMAN THERNSTROM: Yes. Where are we with this?

CHAIRMAN REYNOLDS: Now, as originally crafted, as originally crafted, can we complete the project?

MS. DICKERSON: Part of what we run into is that we issue interrogatories to agencies. And we

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depend on their timely response in order to get the data and documents that we need in order to write the report.

Even with the interrogatories that were sent in early February, we still don't have all of those back. That is even after a great deal of effort on our part working with agencies.

The interrogatories themselves contain probably a couple of dozen questions directed to each agency and document requests as well. It's a good bit of work that we ask them to undertake in order to respond and to respond on time.

I don't believe we had any -- we had requests for extensions from every agency. I don't believe we had any by the deadline. We have faxed, worked with staff since February 8th to get all of the interrogatories back. And we have almost all of them now, but we don't have them all.

So when we start to talk about issuing even other interrogatories to agencies, that we would request more documents and depending on getting that information and being able to go through it, we're not talking in terms of just getting a reply that's a few pages long. In significant instance, it may be

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several boxes long. And the staff still has to go through all of these documents and analyze them and prepare them to be part of the report.

CHAIRMAN REYNOLDS: Okay. How much work was done on this project, December? How much work had we --

MS. DICKERSON: We had done all of our preliminary research. And we had as well prepared interrogatories based on the concept for all of the agencies. And those had gone to the front office, but they weren't signed yet. And then when the new staff director came, you know, it became a matter of presenting those to him in December.

CHAIRMAN REYNOLDS: Okay.

VICE CHAIRMAN THERNSTROM: What form does this project have to take in order for it to be completed by the deadline?

MS. DICKERSON: Well, at this time, it would be very difficult to have the original scope plus an appended scope. We haven't requested -- we don't have the data and information to do all of that. So it would have to be some subset of the original at this point.

VICE CHAIRMAN THERNSTROM: A subset of

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the original. So we narrowed down the original is what you're saying?

MS. DICKERSON: Well, that wasn't my decision, but --

VICE CHAIRMAN THERNSTROM: Well, but, I mean, that's what you're saying is --

MS. DICKERSON: -- in response to --

VICE CHAIRMAN THERNSTROM: I'm asking what's manageable. And what you're saying --

MS. DICKERSON: Yes. In response to your question, yes, only some subset because if you back into the deadline, I mean, the Commission doesn't meet in August. And the report has to be produced and delivered to Congress, per my understanding, and the White House by September 30th. So there is production time in there as well. There is time for the commissioners to receive it, to read it, to discuss it, et cetera.

At this point, there hasn't even been a draft that has gone to the staff director because we are waiting for the interrogatories.

VICE CHAIRMAN THERNSTROM: Is there in theory a possibility of dividing this project into two parts, in effect, so that we produce part A as

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meeting the statutory requirement and we go on to part B subsequently? Is that a possibility?

MS. DICKERSON: In a subsequent fiscal year?

VICE CHAIRMAN THERNSTROM: Yes.

MS. DICKERSON: Certainly the --

VICE CHAIRMAN THERNSTROM: I mean, obviously we have to turn this into something manageable in order to meet the statutory requirement. I'm just trying to get at a possible method of doing so.

CHAIRMAN REYNOLDS: It sounds like that we need to take a look at the document and see how we can slim it down. I don't see any other way to produce this document in a timely fashion unless we narrow the scope.

Commissioner Yaki?

COMMISSIONER YAKI: Yes. I

OCRE

CHAIRMAN REYNOLDS: Is there

VICE CHAIRMAN THERNSTROM: Yes. I would suggest that -- and I think this is the last thing I want to say about what happened before. I mean, I understand, you know, people do things and mistakes

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can be made. I appreciate that. I'm not so concerned about that. I think that the spirit of good will is still here.

Since the interrogatories have gone out that relate to Commissioner Bracer's motion, I would ask that table this until the April meeting and ask the director of OCRE to come back and recommend what aspects of the original proposal she believes could still be doable by the statutory deadline. I think I need that information before I am ready to proceed.

I would accept a proposal that had elements of both. I am not prepared to simply accept a substitute, which is really what is on the table instead. But I would appreciate it if the person who has to do the work but also knows the federal agency process can come back and say, "Well, these things we could do. And the other ones we might have to push off to another time."

CHAIRMAN REYNOLDS: Is there a second?

VICE CHAIRMAN THERNSTROM: Yes. I second that. I like that very much. But I assume -- and I think this falls into a rhetorical question, but I assume that in the meantime, between now and April, you can continue to go full speed ahead on this

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project to get as much work done as possible.

You're not being held up by this. You would not be held up by this motion, would you?

MS. DICKERSON: We have a team working on it full-time. And we have the interrogatories to go through. I will say that it is significant to lose, I guess someone said three weeks, you know, about having a definitive target of where we are going since there is a full-time team working on it.

VICE CHAIRMAN THERNSTROM: Yes. But, I mean, that's my concern. Is your work compromised significantly by accepting what I think is a very good motion here or suggestion by Commissioner Yaki?

COMMISSIONER YAKI: I am not ready to have Commissioner Bracer's motion be approved today, but I would be willing to state that for the purposes of the work of the Commission -- and let me just say this. I understand the realities under which I operate.

So I think as a gesture of good faith, I think that to the extent that she has interrogatories that were promulgated that has data that she must go through, she should be allowed to continue on that pathway without any deal while she looks in it to see

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what elements of the original proposal she could still manage to do if she can in the time period. At that point in April, then we can vote up or down, but I would not want her to stop any work on that.

CHAIRMAN REYNOLDS: Commissioner Meeks?

COMMISSIONER YAKI: And I think the staff director can have that discretion to do that, rather than through a formal motion.

COMMISSIONER MEEKS: And I suggest in April, then, that -- I mean, I think that this project will probably -- I mean, it will sift out to be what is doable, that you will be able to get some sense of that and that we be willing to go forward with that so that we can fulfill our statutory requirements and then in the next year look at doing things --

COMMISSIONER BRACERAS: Right.

COMMISSIONER YAKI: So I would not object if the staff director said she could continue doing the work that she is doing.

COMMISSIONER MEEKS: But I think, I mean, if we're going to approve this project, I mean, I completely agree with Jennifer's motion if it's an expansion.

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But I don't think it's up to the staff director to -- I mean, it's already been done. I understand that. But changing the whole process, why it wasn't approved by the --

COMMISSIONER BRACERAS: I agree.

CHAIRMAN REYNOLDS: Again, that was a mistake. And I was involved in that mistake. I was not aware that we had deviated from the project. Now, after saying that, though, we need to come up with a better plan for meeting our statutory obligations. And I think that we have one.

COMMISSIONER BRACERAS: Yes. I mean, I would just like to have a report in the end that discusses some aspect of race-neutral alternatives. And I'll leave it to Terri to tell us next month what aspect of the race-neutral alternative side of things she can bite off and do. And if that's part of the project, then I'm happy with that.

CHAIRMAN REYNOLDS: Vice Chair Thernstrom?

VICE CHAIRMAN THERNSTROM: But I also completely agree with Commissioners Yaki and Meeks that we cannot -- this is not a substitute. This has to be clearly an addition and that if this report is

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to have integrity, the questions that were originally posed and voted on by this Commission have to be, at least some subsection of them, that subsection which is doable, have to be part of this report. And, therefore, you also have to feel, as it were, that you own this report.

COMMISSIONER BRACERAS: Yes. That was my intention.

CHAIRMAN REYNOLDS: Well, Terri, I'm sorry for dropping this in your lap at this late date, but this is where we find ourselves.

VICE CHAIRMAN THERNSTROM: Good luck.

COMMISSIONER BRACERAS: May the force be with you.

CHAIRMAN REYNOLDS: Okay. So there is nothing to vote on here.

VICE CHAIRMAN THERNSTROM: No.

VIII. FUTURE AGENDA ITEMS

CHAIRMAN REYNOLDS: Okay. Future agenda items?

COMMISSIONER YAKI: Why is the new guy talking so much. Let me just say this --

VICE CHAIRMAN THERNSTROM: Give it another month.

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COMMISSIONER YAKI: I know. One of the things, during one of the breaks at the hearing yesterday, I was talking to the staff director about what is it that we could do that would not cost a lot of money but be very informative and important to the Commission.

One of the things that Commissioner Redenbaugh said is that we have no clear purpose. There is no clear purpose. And his solution, of course, was to detonate it and start all over again.

Mine was to not do that. But I'm just wondering. I just throw this out for people to think about, and maybe we can discuss them next time.

I think in terms of how we think of the agenda in going forward that it would be I think very cost-effective to have a series of hearings here in Washington, D.C. that would basically be almost like an open mike for civil rights organizations of every ilk and stripe to come forth and give us five or ten minutes of what they believe are cutting-edge or interesting or new or neglected or what have you civil rights issues that they're concerned about.

It would be just a way to -- I think it would be invigorating. I think it would be a

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positive sign of outreach by the Commission as a whole to every single organization in this country who could or would want to participate. I just throw it out there to think about.

CHAIRMAN REYNOLDS: Commissioner Yaki, I think it's a great idea. I think that it gives us an opportunity. Well, one issue that I have been wrestling with is what does civil rights means in the Twenty-First Century.

There are different conceptions of what civil rights should be. And a lot of the friction, a lot of the disagreements among the different schools of thought flow from different first principles. And I think it would be healthy if we were to invite various groups in to articulate a particular vision.

So I think it's a great idea.

Vice Chair Thernstrom?

VICE CHAIRMAN THERNSTROM: I actually also think it's a great idea, but I would not want the people from whom we hear to be limited to the organized civil rights communities. There are also scholars who work --

COMMISSIONER YAKI: Exactly.

VICE CHAIRMAN THERNSTROM: -- as

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individuals --

COMMISSIONER YAKI: I agree.

VICE CHAIRMAN THERNSTROM: -- on civil rights-related issues. And I would want to hear from them as well.

COMMISSIONER YAKI: One of the concerns that was brought up -- and as someone who used to chair committees in San Francisco, I can truly appreciate it -- is when people come up and, instead of talking about you, start calling you names.

And my solution to that was that if you were to do something on that, you were to put out an order that they're -- at the first mention of an ad hominem attack on any member of the Commission, you will be removed. Your testimony will be stricken from the record, and you will be barred. That's a powerful chill on people going up and trying to make a mockery out of the proceedings, just to let you know.

I used to throw people out of committee hearings all the time.

(Laughter.)

CHAIRMAN REYNOLDS: Okay. Well, should we entertain a motion to adjourn?

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VICE CHAIRMAN THERNSTROM: Yes. I so
move.

CHAIRMAN REYNOLDS: Okay.

(Whereupon, at 1:06 p.m., the foregoing matter was
adjourned.)

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